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The Influence of the Solicitor General on Procedural and Decision-Making Outcomes of the United States Supreme Court

A Senior Honors Thesis in the Department of Government

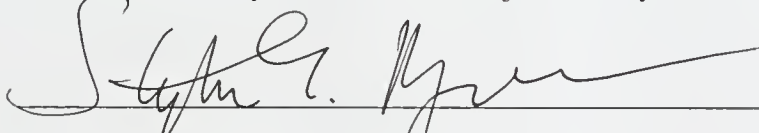
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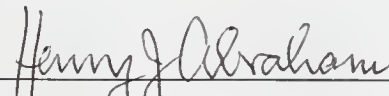

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Introduction

The Role of the Solicitor General in the Supreme Court

The impact of Supreme Court opinions on the American legal system and the body politic is immense and incontrovertible. The nine Justices who possess the ultimate judicial authority in the United States have tremendous influence on the law that governs the American people. This elite institution's national jurisdiction, along with the finality of its opinions, make it a potent national force. Increasing judicial activism has augmented the scope and command of the Court; therefore, its decisions have the potential to carry even greater magnitude. Those who can influence the Supreme Court's opinions may indirectly shape the law of the United States and ultimately its impact on the American people.

The Office of Solicitor General of the United States has an undeniable influence on Supreme Court cases. Often dubbed the "tenth justice," the Solicitor General (S.G.) maintains an exclusive relationship with the Justices and a high degree of involvement in Court activities that would surprise most Americans. The position is often referred to as one of the "most eminent in American law."¹ Compounding the secrecy of the Supreme Court and the Justices' fiercely guarded privacy, the work of the Solicitor General remains largely unseen by all but the keenest Court observers. The S.G. is required to be "an officer learned in the law," and the Justices frequently express respect for his legal expertise. The S.G. is the "principal external actor"² in the Supreme Court and remains

¹ Lincoln Caplan, "The President's Lawyer," *The New York Times*, 18 May 2001, sec. A p.19.

² Act to Establish the Department of Justice. Chapter 150, 16 Statute 162, 1870.

“unmatched [in] status, experience and influence.”³ It is important to analyze the relationship between the Solicitor General (a political appointment) and the Court. This knowledge will not only promote awareness of the role of the Solicitor General, but further understanding of the office’s degree of influence both in procedural outcomes and legally binding opinions of the Supreme Court.

The Creation and History of the Office of Solicitor General

Recognizing that the Attorney General was “increasingly preoccupied with management and politics and had little time for the intricacy of courtroom law,” when Congress established the Department of Justice in 1870, it also created the Office of Solicitor General.⁴ In contrast to the Attorneys General, and even the Justices of the Supreme Court, the Solicitor General is the only officer of the United States required by statute⁵ to be “learned in the law.”⁶ He is a representative of the executive branch and reports directly to the Attorney General and, ultimately, to the President of the United States.⁷ However, the Solicitor General is one of the only two positions (the other being the Vice President of the United States) which has “formal offices in two branches of government.”⁸ The S.G. has “important traditions of deference” to all three branches of government. Justice Lewis Powell asserted that the Solicitor General has a “dual

³ Kevin T. McGuire, “Explaining Executive Success in the U.S. Supreme Court,” *Political Research Quarterly* 51 (1998): 3.

⁴ *Ibid.* 5.

⁵ Act to Establish the Department of Justice, Chapter 150, Section 2 16 Statute 162, 1870.

⁶ Seth Waxman, “Presenting the Case of the United States as It Should Be: The Solicitor General in Historical Context,” Address to the Supreme Court Historical Society, 1 June 1998, <<hyyp://www.usdoj.gov/osg/aboutosg/sgarticle.html>>.

⁷ There has never been a female Solicitor General.

⁸ Caplan, “The President’s Lawyer.”

responsibility;” to represent the executive administration but also to aid the Supreme Court in “developing the law in ways that serve the long term interest of the United States.” The Solicitor General’s responsibility to defend federal statutes may even constitute a third responsibility to Congress.⁹ This unique commitment has allowed the Solicitor General to enjoy an increasing degree of independence. Additionally, this autonomy has produced an objectivity and influence that have affected the White House and Supreme Court’s expectations of the S.G.

The 1870 act establishing the Department of Justice and the Solicitor General created huge responsibilities for the office. These expectations were loosely defined as the composition of legal opinions, the handling of Supreme Court litigation, “riding circuit,”¹⁰ and the supervision of the government’s most sensitive litigation. The first Solicitors General did much to shape the duties of the office. Benjamin Bristow, who was the first Solicitor General, “took only a little time to establish primacy over the government’s Supreme Court docket.”¹¹ Though in the earliest days of the office some S.G.s occasionally tried cases before juries, the office has had a marked tendency to “concentrate on government appeals, especially to the Supreme Court.”¹² Bristow’s most important contribution to the office, however, reflects “perhaps the most significant function performed by *modern* Solicitors General: determining and coordinating the

⁹ Caplan, “The President’s Lawyer.”

¹⁰ “Riding Circuit” refers to holding Court twice a year in the nation’s thirteen circuits, as was the practice for the first 110 years of the Supreme Court.

“The Court as an Institution,” <<<http://www.uscplus.com/info/instit.htm>>>.

¹¹ Caplan, “The President’s Lawyer.”

¹² Lincoln Caplan The Tenth Justice: The Solicitor General and the Rule of Law (New York: Alfred A. Knopf, 1987), 5.

litigation position of the United States in courts across the country.”¹³ When the government received an adverse decision in the lower court, it was the responsibility of Bristow [and subsequent Solicitors General] to decide how best to appeal the case and to “harmonize the government’s appellate litigation.”¹⁴

Beyond the general evolution of the office obvious to most observers of the Supreme Court, “little has been written about the S.G.” and his developing contribution to government. “The history...is passed on among the small circle of lawyers...which is then retold to a new S.G. or lawyer in the office so he will know the tradition he’s expected to uphold.”¹⁵ For an office of tremendous national importance, it has drawn “little public or even scholarly attention.”¹⁶

Americans are poorly informed about the responsibilities or even the existence of the Office of the Solicitor General.¹⁷ This ignorance is unfortunate as many former Solicitors General have moved on to occupy very prestigious and powerful positions in all branches of the government. Many have become judges and “four have risen to the Supreme Court.”¹⁸ Probably the three most famous and respected Solicitors General are Archibald Cox (1961-1965), John W. Davis (1913-1918), and former Supreme Court Justice Robert Jackson (1938-1940.) Other notable Solicitors General include Kenneth Starr, and Robert Bork.¹⁹

¹³ Waxman.

¹⁴ Waxman.

¹⁵ Caplan, The Tenth Justice: The Solicitor General and the Rule of Law, 5.

¹⁶ Caplan, “The President’s Lawyer.”

¹⁷ Caplan, The Tenth Justice: The Solicitor General and the Rule of Law, 3.

¹⁸ Caplan, The Tenth Justice: The Solicitor General and the Rule of Law, 5.

¹⁹ Caplan, “The President’s Lawyer.”

The office is the size of a small law firm and consists of the Solicitor General and fewer than two-dozen staff attorneys. Though primarily housed in the Department of Justice, the SG also has his own office on the first floor of the Supreme Court building, just down the hall from the courtroom.²⁰ The fundamental responsibility of the S.G. is to represent the federal government in the Supreme Court; “to supervise and conduct government litigation.”²¹ By law and by practice, however, the Solicitor General’s obligations and responsibilities to both the White House and the Supreme Court extend far beyond defending the federal government.²²

Attorneys in the Office of the Solicitor General face the very daunting task of representing the executive government. The federal government appears as litigant in more than 40% of the cases granted *certiorari* by the Court.²³ The responsibility of the office has evolved into an implicit relationship with the Supreme Court. “Justices rely on the S.G. more than anything else as to which cases should be taken.”²⁴ The role of the S.G.’s office has developed beyond “government advocate.” Several times each term the Justices “turn to the office for legal questions which are vexing.”

The less exciting work of the Solicitor General’s office includes determining which federal cases should be appealed from the Circuit Courts of Appeals to the Supreme Court. The office must distinguish the cases which are “ripe for appeal.”²⁵ This task takes up the majority of the efforts of the S.G.’s staff attorneys and provides an

²⁰ Lawrence Baum, The Supreme Court, (Washington, D.C: The Congressional Quarterly, 1995), 102.

²¹ Office of the Solicitor General, Official Website of the Department of Justice. “Functions of the Office” <<<http://www.usdoj.gov/osg/aboutosg/function.html>>>.

²² Caplan, The Tenth Justice :The Solicitor General and the Rule of Law, 12.

²³ Baum, 115.

²⁴ Caplan, The Tenth Justice: The Solicitor General and the Rule of Law, 5.

²⁵ Caplan, The Tenth Justice: The Solicitor General and the Rule of Law, 7.

indispensable service for the Supreme Court. The screening process ensures that the vast majority of the cases the S.G.'s office appeals are of great importance, very often worthy of a writ of *certiorari*. The Justices of the Supreme Court "rely on the Solicitor General more than anyone else to help choose and present the most pressing matters for review."²⁶ Thus, the S.G.'s office has a reputation for "self-restraint," or, at the extreme, "stinginess" in requesting review. The willingness to restrain from appealing every government loss in the lower courts translates as "a desire to ease the Court's workload and to maintain the Solicitor General's credibility with the Justices."²⁷

The independent Office of Solicitor General confounds the system of checks and balances. Because the S.G. has deference to all three branches of government and physical offices in two, the authority governing the office is vague. Legal scholars believe that the S.G. is largely free from involvement by the executive and the judiciary. His relationship with the Supreme Court is unique and requires a generous degree of independence from the President and the Attorney General. "Almost every administrative unit [of the S.G.'s office] has a good deal of freedom to make its decisions on day-to-day matters."

It would be inaccurate, however, to imply that the S.G. is immune from the influence of his appointing administration. "The Solicitor General operates in a general climate created by the president and the attorney general, and officials in the Justice Department and the White House intervene in the makings of specific decisions."²⁸

²⁶ Caplan, The Tenth Justice: The Solicitor General and the Rule of Law, 6.

²⁷ Baum, 106.

²⁸ Baum, 104.

The authority of politics over the Solicitor General is evident in the office's shifting positions between executive administrations. In 1993, four cases diverged in their stances from the George H.W. Bush to Clinton administrations. In a more recent, high-profile example, between the Clinton and George W. Bush administrations, the Solicitor General shifted the government's interpretation of the Second Amendment. "Reversing decades of official government policy," in a footnote filed in the briefs of the two cases (*Emerson v. United States*²⁹ and *Haney v. United States*³⁰) Solicitor General Theodore Olson argued that the Constitution "broadly protects the rights of individuals [not only groups or militias]" to own firearms.³¹

The Solicitor General's influence and independence form the basic inquiry of the subsequent research. Both themes must be studied in the context of the relationship between the Supreme Court and the S.G. If the Solicitor General has the potential to impact a high degree of influence over the Supreme Court's proceedings, then it is imperative to understand the forces which direct the Solicitor General's positions. Obviously, Presidents will appoint S.G.'s who share similar visions of the law, but the executive branch is more of a client to the Solicitor General than a boss. Most scholars agree that, "by tradition and because of his responsibilities to the Court," an S.G. must be free to reach "his own carefully reasoned conclusions about the proper answer to a question of law...without the insistence that his legal expertise conform to politics." To

²⁹ 46 F. Supp. 2d 598 (1999).

³⁰ 37 F.3d 243, 250 (1994).

³¹ Linda Greenhouse, "U.S. in a Shift: Tells Justices Citizens have a Right to Guns," *The New York Times*, 8 May 2001, sec. A p. 1.

Orders List issued by the Clerk of the Court. Because these invited *amicii* are certainly not discretionary for the S.G., the White House has reduced control over the government's participation in these cases. The current Solicitor General, Ted Olson has been asked for his views in a record number of cases: twenty-three in the 2002 term. The recent average has been approximately 16 CVSGs per term. Some pundits view this sharp increase as the Supreme Court's increasing dependency on the administration and a growing concern for the impact of cases on the executive branch. Others view it as the Court's "high regard for Olson."³⁴

Though no official rule exists, scholars hypothesize that Supreme Court practice requires a vote of only three justices to issue a CVSG. In most instances, a vote of four is required to grant a case review. Former law clerks offer insight into the request for these briefs as "a pretty good device when you [have] a hard time figuring out what a case [is] all about." CVSGs are more frequent in the Court's busiest periods and sometimes serve as a "refuge for timid law clerks...If they can't decide whether to recommend that the Court grant a case, they suggest shipping it over to the S.G."³⁵

Throughout history, the public and private relationship between the Solicitor General and the Supreme Court has been closer than either side would like to acknowledge. Until the 1970s, when a Solicitor General was confirmed by the Senate, he would call upon each of the Justices. The Justices "impressed their reliance on the Solicitor General [for] the accuracy and trustworthiness of the government's briefs and

³⁴ Stephen S. Meinhold and Steven A. Shull, "Policy Congruence between the President and the Solicitor General," *Political Research Quarterly* (1998): 527.

³⁵ Meinhold and Shull, 527.

[the] expectation of high quality.”³⁶ The private ties between the Supreme Court Justices and the Solicitors General extend to such informalities as frequent private lunches. When conservative CNN correspondent Barbara Olson, then the wife of the current Solicitor General, was tragically killed on September 11, 2001, when terrorists crashed her airplane into the Pentagon, Justice Clarence Thomas, his wife Virginia, and their adopted grandnephew rushed to Olson’s side and “stayed at his home for hours.”³⁷ The public relationship between the Solicitor General and the Supreme Court is even more dramatic. When a Justice or former Justice passes away, practice has dictated the Solicitor General to gather members of the Supreme Court Bar in honoring the Court member. This duty gives the S.G. the role of “President of the Supreme Court Bar” (although no such official position exists).³⁸

The relationship between the Supreme Court and the Solicitor General’s office has been repeatedly termed a “partnership.” The Court depends on the S.G. for legal advice on particularly difficult matters and a constant supply of high-quality government requests for *certiorari*. In return, the Supreme Court affords the office an unrivaled opportunity to influence it thorough an almost ubiquitous presence in the Court’s most high-profile cases. The Supreme Court also gives Solicitors General favorable treatment in how his briefs and cases are filed. The S.G. is the only *amicus* party allowed to file a brief on the merits without the consent of counsel for the petitioning and responding party. Additionally, the S.G. consistently takes advantage of the unique practice referred to as “lodging,” dropping off records (or evidence) pertinent to a particular case up for

³⁶ Caplan, The Tenth Justice: The Solicitor General and the Rules of Law, 19.

³⁷ Tony Mauro, “U.S. Supreme Court Community Swept into Vortex of Attacks by Terrorists,” *The New Jersey Law Journal*: 17 September 2001.

³⁸ Mauro.

review. Law clerks and the Justices may immediately begin examining the lodgings without waiting for the materials to travel through the regular administrative channels. The controversial practice runs counter to the rule that “appeals courts cannot consider evidence that has not been presented by an appeals court below.”³⁹

Seth Waxman as Solicitor General

My study will focus on two illustrative S.G.s: Seth Waxman and Ted Olson. Appointed by President Clinton in 1997, Seth Waxman was the second Solicitor General of the administration (following Drew W. Days). His legal education and received accolades illustrate that he indeed fits the requirement of being “learned in the law.” Earning his B.A. from Harvard University and his J.D. from Yale Law School, Waxman held the prestigious post of managing editor of the *Yale Law Journal*. As a “white collar defense lawyer,” Waxman was in private practice when he argued his first case before the Supreme Court (and won, ironically against the government). His confirmation hearings were not especially contentious, and the Senate approved him by a voice vote in November 1998.⁴⁰ Prior to his appointment as Solicitor General, Waxman had substantial experience in the U.S. Department to Justice, including holding positions as Acting Solicitor General, Acting Deputy Attorney General, Principal Deputy Solicitor General, and Associate Deputy Attorney General. During his three-year tenure as S.G., he argued thirty cases before the Supreme Court.⁴¹ After his term as S.G. expired,

³⁹ Mauro.

⁴⁰ Joan Biskupic, “‘10th Justice’ States his Case,” *The Washington Post*, 2 March 1998.

⁴¹ “Seth Waxman, 41st Solicitor General,” Official Website of the Department of Justice. <<<http://www.usdoj.gov/osg/aboutosg/waxmanbio.html>>> .

Waxman joined the large prominent Washington, DC law firm, Wilmer, Cutler & Pickering, as partner, specializing in Supreme Court litigation.⁴²

Theodore Olson as Solicitor General

The confirmation of Ted Olson to Solicitor General in 2001 followed a controversial and partisan debate. The vote on it was delayed and, with the agreement of Republicans, the Senate Judiciary Committee, launched a limited investigation. Democrats accused Olson of participating in the “Arkansas Project” to bring down the President Clinton, as well as lying to the Senate Judiciary Committee.⁴³ Critical Democrats even characterized Olson as a “right-wing celebrity and Kenneth Starr-pal.”⁴⁴ Nevertheless, his career as Solicitor General has been marked by measurable success in winning the vast majority of the government’s cases. Unfortunately, the 42nd Solicitor General has received much more publicity for his personal tragedy, the above-mentioned death of his wife Barbara Olson, than his professional achievements.⁴⁵

Olson attended California public schools and completed his undergraduate career at the University of the Pacific in Stockton. He received his J.D. from the University of California at Berkeley, where he achieved membership on the *California Law Review* and Order of the Coif. Under President Reagan, Olson served as an Assistant Attorney General for the Office of Legal Counsel. He has worked at private law firms in

⁴² “Former U.S. Solicitor General Seth P. Waxman Joins Wilmer, Cutler & Pickering,” *Business Wire*, 5 July 2001.

⁴³ “Borking Olson: Theodore Olson’s appointment to Solicitor General,” *The National Review*, 11 June 2001.

⁴⁴ Joe Conanson, “Ted Olson’s Anti-Clinton Past,” *Salon.com* <<<http://archive.salon.com/politics/feature/2001/02/06/olson.html>>>.

⁴⁵ Maria Hinojosa, “On September 11, Final Words of Love,” *CNN.com* <<<http://www.cnn.com/2002/US/09/03/ar911.phone.calls/>>>.

California and Washington, DC. Before his nomination and appointment as Solicitor General in 2001, he represented George W. Bush and Dick Cheney in the Supreme Court case *Bush v. Gore*, which resolved the 2000 presidential election in their favor.⁴⁶

Supreme Court Procedure

The Supreme Court now receives over 8,000 requests for review of cases each year. These filings petition the Court to grant a writ of *certiorari*. “To be informed,” in Latin, a writ of *certiorari* is an order from the Supreme Court to a lower court for the entire record of the case. Of these 8,000 petitions only about 1% are granted *certiorari* and scheduled for oral argument. The current fee for filing a petition for writ of *certiorari* is \$300. The majority of the cases filed with the Clerk’s Office are submitted with a petition to proceed *in forma pauperis*, which is an appeal for indigent status. Over 6,000 petitions are filed *in forma pauperis*. Often completed by prisoners, in their own handwriting, these petitions have very lenient requirements, (unlike “paid” petitions, the printing of which can cost upwards of \$20,000). Not surprisingly, the percentage of *in forma pauperis* cases granted *certiorari* is very low; less than .5% are reviewed each term.⁴⁷

When a petition for a writ of *certiorari* is filed, the respondents (or the opposing party/counsel) have 30 days to file a response. Cases are always titled beginning with the petitioner’s name: *Petitioner v. Respondent*. Regardless of the plaintiff or defendant in the lower courts, the full first name in a title always refers to the party filing the petition.

⁴⁶ “Theodore B. Olson,” Official Website of the Department of Justice, <<http://www.usdoj.gov/osg/aboutosg/t_olson_bio.htm>>.

⁴⁷ Baum.

In the thirty-day time period after the petition has been posted on the docket, *amicus curiae* briefs may be filed supporting the petition or arguing against a grant of *certiorari*. *Amicus curiae* briefs are often filed by organizations, corporate counsel, or the Solicitor General. After this thirty day period, the petition is then sent up to the Justices' chambers and enters into the "cert. pool." Each of the nine Supreme Court Justices has four law clerks (with the exception of the current Chief Justice who hires only three clerks each term) who divide the petitions for a writ of *certiorari* and issue recommendations to their Justices on the merits of the case.⁴⁸ Thirty-one law clerks divide the petitions and issue memorandums to their Justices on whether an application in their opinion, is worthy of a grant of review. While there are no exact criteria for successful applications, cases in which a decision by the District Court was reversed by the Court of Appeals, deemed a "spilt-circuit" are often taken up by the Supreme Court to resolve the legal controversy.

Without secretaries or law clerks, the Justices meet in a private conference to discuss the existing round of petitions for *certiorari*. Unlike the majority required in the decision phase, a petition needs the vote of only four Justices to grant review, five for a petition for *habeas corpus*. This unofficial practice, not defined in the *Rules of the Supreme Court*, is referred to as the "Rule of Four." Counsel of the 1% of petitions granted review are notified by the Clerk and begin a second stage of filing briefs on the merits, or substance, of the case. The petitioner is given thirty days to file a brief on the merits and the respondent is given an equal opportunity to file his argument.

In the merits stage, *amicus curiae* parties take a more significant role. In some cases, upwards of thirty *amicus curiae* briefs, supporting either the petitioner or

⁴⁸ Justice Steven's law clerks do not participate in the cert pool and receive a copy of each of the applications.

respondent, are filed. The *amicus* party must first attain permission from both parties before filing a brief. Occasionally a case is decided by summary judgment, only with the briefs on the merits. However the majority of the cases are scheduled for oral argument in which counsel for each of the parties are given thirty minutes to present their case and respond to the Justices' questions. The Court frequently requests the Solicitor General to participate in a case with an *amicus curiae* brief or oral argument. The S.G. is virtually the only *amicus* party who is ever invited to present an oral argument, again illustrating the Court's respect for the offices' legal expertise. The amount of time the Solicitor General is allotted for argument can vary from ten minutes to an hour.⁴⁹

⁴⁹ Baum.

Literature Review

In his 1987 book, *The Tenth Justice: The Solicitor General and the Rule of Law*, political scientist Lincoln Caplan⁵⁰ observes that “except for a few articles in law reviews, occasional mentions in books about other legal topics, and speeches by Solicitors General reprinted in bar journals, little has been written about the Solicitor General.”⁵¹ Biased sources and methodology compound the deficiency in academic research on the subject. Much of what is written on the Solicitor General comes from alumni of the office or a very small number of lawyers who have repeatedly published on the topic in law reviews. Most literature offers reflections from former Solicitors General on the evolution of the role and duties of the political appointment. The influence and relationship between the Supreme Court Justices and the Solicitor General have not been sufficiently researched and critical work on the subject is sparse.

Without a foundation of prior research, it is impossible to survey the evolution of intellectual thought on the influence of the Solicitor General. With the exception of isolated law review articles written by former S.G.’s during the 1940s and 1950s, a spate of publications in the late 1980s and early 1990s constitutes the bulk of literature on the Solicitor General. Both Caplan’s *The Tenth Justice* and Rebecca Mae Salokar’s⁵² *The Solicitor General: Politics of Law*⁵³ were published during this period and remain the only books entirely dedicated to the S.G. Subsequent law review articles represented a

⁵⁰ Lincoln Caplan is a Knight Senior Journalist and professor at the Yale Law School. <<<http://www.law.yale.edu/outside/html/faculty/lc225/profile.htm>>>

⁵¹ Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law*, 10.

⁵² Rebecca Mae Salokar is Associate Professor of Political Science at Florida International University, << www.temple.edu/tempress/titles/865_reg_print.html>>.

⁵³ Rebecca Mae Salokar, *The Solicitor General: The Politics of Law*, (Philadelphia, PA: Temple University Press, 1992).

renewed interest in the powerful, yet often unseen, office. Since 1995, however, substantial work on the Solicitor General has almost completely halted. An interview or human-interest story⁵⁴ on the S.G. is occasionally featured in legal periodicals, and mention of the Solicitor General is very rare in national newspapers.⁵⁵ A 2002 symposium at Brigham Young University brought together former Solicitors General and Court practitioners to discuss the office. The absence of critical work on the Solicitor General limits knowledge of his relationship with the Justices and the extent of his influence on the Court to a very exclusive group in the legal community. The lack of historical research and inherent conflicts of interest in much of the work published about the Solicitor General makes a methodological or chronological literature review difficult.

While the biases of literature by former S.G.s warrants a distinct examination, a thematic review of literature on the Solicitor General reveals a sharp divide between works written by office alumni and independent researchers. Most publications by former Solicitors General explain the role and duties of the office, the burdensome workload or narrate anecdotes about Court litigation.⁵⁶ Conversely, lawyers and political scientists tackle controversies and publish the vast majority of analytical research on the Solicitor General. Initially, the bibliography on the Solicitor General may seem to provide an adequate foundation to pursue precise studies. If memoirs, biographies, or works written

⁵⁴ Often, publications remarked on the S.G.'s winning record or the tragic death of Solicitor General Theodore Olson's wife Barbara on September 11, 2001.

⁵⁵ Joan Biskupic, "Politics Still Plays a Role in Solicitor General's Office," *The Washington Post*, 22 February 1994.

⁵⁶ Former S.G. Stanley Reed's collapse from exhausting during the middle of a three-day argument on the constitutionality of AAA and the Bankhead Act was profiled in the New York Times in 1935.

by former Solicitors Generals are subtracted, however, the scarcity of academic work is regrettably disproportional to the power and importance of the office.

Books on the Solicitor General

Caplan and Salokar's books offer the most comprehensive resource for researchers of the Solicitor General. Each book uses a distinct and different methodology, yet both concentrate on the relationship between the executive branch and the Solicitor General. Lincoln Caplan's *The Tenth Justice* offers a historical account of the evolution of the Office of Solicitor General. While tracing the office's growth from a single officer responsible for assisting the Attorney General,⁵⁷ to an office the size of a small law firm, Caplan emphasizes the prestige of the S.G.'s lawyers and the superb quality of his legal representation. Although the *Bakke*⁵⁸ case established the S.G.'s independence from the Attorney General, few other landmarks exist to analyze the relationship with the executive. Caplan assesses the varying degrees of involvement in Court activities by the Solicitor General during different presidential administrations; yet the majority of his evidence comes from memoirs or interviews.

Caplan only dedicates one chapter to the S.G.'s responsibilities with the Court. The book provides extensive analysis into the development of an independent Solicitor General, rather than documenting a close relationship with the Justices. Caplan's priority is to expose the power of this obscure office and to offer unprecedented understanding of

⁵⁷ First Solicitor General Benjamin Bristow tried cases before juries and gained a reputation for prosecuting the Ku Klux Klan.

⁵⁸ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). The *Bakke* decision is one of the earliest affirmative action cases heard at the United States Supreme Court. Although no one majority opinion was filed, the case is most famous for its conclusion that quotas systems used by college admissions offices are unconstitutional.

a complex history of divided responsibilities. He presents controversies such as independence from the Attorney General, promotion of the policies of an activist President, and conflicting responsibilities for all three branches of government. *The Tenth Justice* is an excellent introduction to the Solicitor General and fully recognizes the power of the office as “the individual who has best represented [the] dedication...of the United States...commitment to the rule of law.”⁵⁹

Salokar’s *The Solicitor General: The Politics of Law* contends that the “nation’s lawyer” is vital to executive policy-making. She recognizes the Solicitor General’s peripheral roles in managing the government’s appeals to the Supreme Court and as an *amicus* party along with other responsibilities stemming from the S.G.’s deference to all three branches of government. Salokar’s study argues that the Solicitor General’s obligation to the executive branch is strong enough to diminish the office’s independence.

Salokar’s methodology is the greatest strength of her study. She reviews all Solicitor General participation between 1956 and 1986, distinguishing between roles as litigant or *amicus* party. The litigation of the Solicitor General is broken down into *certiorari* petitions, appellate cases and extraordinary writs. Her statistics are coded using presidential administration and “party in control”⁶⁰ as variables. Salokar’s results contrast the S.G.’s success in seven different presidential administrations. Salokar uses interviews with former Solicitors General to support her statistical data. The coupling of statistical results and personal interviews indicates that, while the Solicitor General benefits from functional independence from the Attorney General, the office remains political by

⁵⁹ Caplan, *The Tenth Justice*, 3.

⁶⁰ Democratic or Republican executive administration.

advancing the administration's policy agenda through both case selection and "argument formulation."

Literature Written by Former Solicitors General

The relationship between the Supreme Court and the Office of Solicitor General does not garner public attention. Supreme Court conferences most often remain secret until a Justice's papers are revealed. Presidential or Attorney General involvement with the Solicitor General is rarely documented, as most occur in rather "low-profile discussions within the administration that never become known to the public."⁶¹ While loyalty to the administration and conflicts of interests are to be expected, work by former Solicitors General presents the best opportunity available for a view inside the elite office.

At the beginning of the twentieth century, Solicitors General began publishing articles in law reviews to explain the role and duties of the office. Avoiding controversy, the law review articles are general and official, some written by incumbent S.G.'s. Thomas D. Thatcher⁶², published "Genesis and Present Duties of the Office of Solicitor General" in the *Journal of the American Bar Association* shortly after his appointment. For the next two decades, the only record of literature on the Solicitor General was published in the *Journal of the American Bar Association* with similar informational themes. Former S.G.'s Charles Fahy's⁶³ "The Office of Solicitor General," and Simon E.

⁶¹ Drew S. Days, "The Office of Solicitor General: When the President says 'No.'" *The Journal of Appellate Practice and Process*, 3 (2001).

⁶² Solicitor General from May 1930 to May 1933.

⁶³ November 1941-September 1945.

Sobeloff's⁶⁴ "Attorney for Government: The Work of the Solicitor General," are introductions to the responsibilities of the office and are targeted to the legal community.

Until the late 1980s, Solicitors General continued to publish only superficial information on the office in law reviews: describing its responsibilities, case-load and anecdotes from litigation: Archibald Cox's⁶⁵ "The Government and the Supreme Court" in the *Chicago Bar Record* (1963) and Erwin N. Griswold's⁶⁶ "The Office of Solicitor General-Representing the Interests of the United States before the Supreme Court" in the *Missouri Law Review* (1969), are examples of this period in literature on the S.G. In the 1970s, the frustrations and conflicting responsibilities of the position were first published in Robert Bork's⁶⁷ "The Problems and Pleasures of Being Solicitor General" in the *Antitrust Law Journal* (1972), and Charles Fahy's⁶⁸ "Special Ethical Problems of Counsel for the Government" in the *Federal Bar Association Journal* (1974.) The trend continues into the mid-1980s, as former Solicitors Generals Rex Lee⁶⁹ and Wade McCree⁷⁰ published law reviews entitled "Lawyering for the Government: Politics, Polemics & Principle" in the *Ohio State Law Journal*, and "The Solicitor General and his Client" in the *Washington University Law Quarterly*.

Literature by Independent Researchers

Other than occasional general work in trade journals (Philip Perlman "The Work of the Office of Solicitor General of the United States," 1949) independent analytical

⁶⁴ February 1954-July 1956.

⁶⁵ January 1961-July 1965.

⁶⁶ October 1967-June 1973.

⁶⁷ June 1973-January 1977.

⁶⁸ November 1941-September 1945.

⁶⁹ August 1981 - June 1985.

⁷⁰ March 1977 - August 1981.

research on the Office of Solicitor General does not appear until the 1950s. These works tackled existing controversies. Robert Stern's "'Inconsistency' in Government Litigation" in the *Harvard Law Review* (1951) confronts the irregularities in the government's representation between presidential administrations, concluding that the Solicitor General is clearly influenced by the incumbent political party.

After the publication of Caplan's and Salokar's groundbreaking books on the Solicitor General in the late 1980s and early 1990s, more concentrated studies began appearing in law reviews and professional journals. Most articles following Caplan and Salokar concentrated on the S.G.'s independence from the executive branch. Jeffrey Segal⁷¹ is one of the leading researchers on the Solicitor General during this period, repeatedly publishing on the subject in law reviews. In his 1990 article, "Supreme Court Support for the Solicitor General During the Warren and Burger Courts" in the *Western Political Quarterly*⁷² he found by comparing the ideology of the individual justices with the Solicitor General brief that party identification is the most important factor explaining the success of the Solicitor General. He finds that the Solicitor General is most successful with Justices who have been appointed by the same incumbent administration. Other scholars, such as Kristen Norman-Major:⁷³ "The Solicitor General: Executive Policy Agendas and the Court" *Albany Law Review* (1994);⁷⁴ Janene M. Marasciullo:⁷⁵

⁷¹ Professor in the Department of Political Science, State University of New York, Stony Brook. <<<http://www.sunysb.edu/polsci/jsegal/research.htm>>>.

⁷² Jeffrey Segal, "Supreme Court Support for the Solicitor General: The Effect of Presidential Appointments," *Western Political Quarterly* 43 (1990): 137.

⁷³ Professor of Public Administration at Hamline University, <<http://piperline.hamline.edu/pls/prod/hamwebsite.P_WebSite?site=GPAM&thisurl=http://www.hamline.edu/graduate/gpam/Companies/Teaching_Opportunities.htm>>.

⁷⁴ Norman-Major, Kristen A., "The Solicitor General: Executive Policy Agendas and the Court," 57 *Albany Law Review* 1081 (1994).

“Removeability and the Rule of Law: The Independence of the Solicitor General” *George Washington Law Review* (1989),⁷⁶ and John O. McGinnis:⁷⁷ “Principle Versus Politics: the Solicitor General’s Office in Constitutional Bureaucratic Theory,” *Washington University Law Review Quarterly* (1989),⁷⁸ concentrate their work on debating the interests of the Solicitor General and the proper role he should play before the Supreme Court and in politics.

Published work relevant to my current study is scarce. Aside from articles on the success of the Solicitor General are featured in professional periodicals such as John A. Jenkin’s “The Solicitor General’s Winning Ways” in the *Journal of the American Bar Association*⁷⁹, in-depth examinations on the degree of success between administrations is limited to Salokar’s aforementioned study and Karen O’Connor’s⁸⁰ “The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation” in *Judicature* (1993).⁸¹

⁷⁵ Attorney, Commercial Litigation Branch in the Civil Division of the U.S. Department of Justice,
<<<http://www.ll.georgetown.edu/federal/judicial/fed/opinions/97opinions/97-3332.html>>>.

⁷⁶ Marasciullo, Janene M., “Removeability and the Rule of Law: The Independence of the Solicitor General,” 57 *George Washington Law Review* 750 (1989).

⁷⁷ Professor of Law at Northwestern University,
<<<http://www.law.northwestern.edu/faculty/fulltime/McGinnis/McGinnis.html>>>.

⁷⁸ McGinnis, John O., “Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory,” 44 *Stanford Law Review* 799 (1992).

⁷⁹ Jenkins, John A., “The Solicitor General's Winning Ways,” 69 *American Bar Association Journal* 734 (1983).

⁸⁰ Professor and Political Scientist at the School of Public Affairs, American University,
<<<http://www.american.edu/spa/gov/faculty/oconnork.html>>>.

⁸¹ O'Connor, Karen, “The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation,” 66 *Judicature* 256 (1993).

O’Conner finds that by assuming the third party “friend of the court” role in cases, the Solicitor General is still a potent source of legal reasoning.

Evaluation

Former S.G.s and independent researchers have sufficiently documented the evolving roles and responsibilities of the Solicitor General. Academic work on the office, however, is still sparse and unfocused. Caplan’s *The Tenth Justice* was the first academic source to expose the importance of the Solicitor General in the outcomes of Supreme Court decisions. The relationship between the President and the Solicitor General has been evaluated more carefully than the office’s influence with the Court. The secrecy surrounding both institutions compounds research across different federal branches. Political scientists have not fully pursued the many controversies inherent in an executive appointment with so much power in the “independent” judiciary. Most academic work attributes a policy-oriented role to the Solicitor General, while former S.G.s emphasize the impartial, legalistic role of the office to the Court in their publications. The potential for research on the Solicitor General is almost endless.

Research Design

Research Questions

The Solicitor General enjoys unrivaled access and esteem at the United States Supreme Court. While the Justices' ideology and other sources of influence have been studied extensively, curiously the most prominent outside actor in Court proceedings has not been sufficiently researched. The Supreme Court and the Department of Justice are both insular institutions discouraging and complicating focused research. The deficit in academic work on the S.G. can be attributed to these research obstacles and inadequate attention to the office from the media. I hope to ameliorate the dearth of academic work on the Solicitor General by contributing new insight into the extent of his influence on all levels of Court litigation. My research tackles the challenging inquiry into the relationship between the Justices and the Solicitor General. The principal aim of my research is to measure the success, and gauge the influence, of the Solicitor General on the outcomes of the Supreme Court.

As a politically appointed officer, the S.G. is immediately responsible to the Attorney General, and ultimately accountable to the President of the United States. Although the S.G. is afforded a degree of independence from the executive, it is imperative that relevant research still accounts for the political climate in which the office operates. In addition to measuring influence over several levels of Court litigation, my research also combines a comparative examination of the success between a Democratic and a Republican appointed Solicitor General.

To examine fully the effect of the S.G. on the Supreme Court, both procedural and decision-making outcomes are studied independently. The importance of studying

influence over Court decisions is clear because the majority opinions become the law of the land. Procedural advocacy, however, is becoming an increasingly significant vehicle for accessing the Court. As the number of petitions on the Court's docket swells each term, and the number of cases granted review decreases, pressure over decisions at the procedural stage must be examined.

The involvement and influence of the S.G. in procedural activities and products will be measured quantitatively. A statistical comparison will analyze the results between the two terms. Both quantitative and content analysis will be employed to analyze influence over the Court's opinions. My research will culminate in a comprehensive and comparative assessment of S.G. advocacy at the petition and merit levels of Court proceedings.

My principal inquiry is how successful the Solicitor General is in his Supreme Court advocacy and how influential is his litigation in the formulation of the Court's majority opinions. My secondary questions will measure the involvement and influence of the Solicitor General between a Democratic and Republic incumbent administration. I will study how successful the S.G. is in his procedural-level advocacy. I will measure how often the majority opinion reflects the conclusion advocated by the Solicitor General in his briefs filed on the merits of a case. As reflected in agreement and parallels between the legal reasoning of the S.G.'s briefs and the majority opinion, I will analyze how influential the Solicitor General is in affecting the articulated legal reasoning employed in the Court's official decisions. Finally, in fulfilling his official and implicit responsibilities to the Supreme Court, I will conclude which of the Solicitor General's roles are most effective and respected by the Justices.

Methodology

Highlighted for their currency and relevancy, the October 1999-2000 and 2001-2002 have been sampled and form the foundation of the following research. Divided by only one year, the examination of two recent terms alleviates intervening variables such as changes in Court personnel and practice. As individual Justices' philosophies and theories of constitutional interpretation may shift over time (albeit often slowly), the analysis of these terms also controls for evolutions in Court ideology. In the October 1999 term, Clinton appointee Seth Waxman was the government's advocate. In the 2001 term, Theodore Olson was as President Bush's Solicitor General.

Analysis of Outcomes at the Procedural-Level

Examination of procedural-level advocacy requires a quantitative approach. Several different opportunities exist to examine the S.G.'s procedural-level advocacy. The Solicitor General's petitions for a writ of *certiorari* are recorded and compared against the Court's official order for review on the case. The Solicitor General also often files *amicus curiae* briefs on a petition for *certiorari* in which he advises the Court if a case warrants review. Occasionally, the Supreme Court extends an invitation⁸² to the Solicitor General to express his views on a petition in the form of an *amicus* brief. The success of the S.G.'s *amicus curiae* briefs at the petition stage will be measured if the disposal of the request for review is consistent with the S.G.'s advocacy. Once a case has been granted a writ of *certiorari*, the Solicitor General may voluntarily submit an *amicus* brief. However, sporadically the Court solicits an *amicus* on the merits of a case from the S.G. The success of these *amicus* briefs submitted at the "merits" or decision-making

⁸² These invitations are abbreviated as CVSGs (Call for the Views of the Solicitor General) on the Court's Orders List.

level will form the second level of procedural analysis. As neither the Supreme Court's Office of the Clerk nor the Solicitor General publishes statistics on its procedural-level advocacy, my examination requires data collection from original docket sheets, orders lists, and the S.G.'s petitions for *certiorari* and *amicus* briefs.

Analysis of Outcomes at the Decision-Making Level

With over 8,000 cases filed in the Supreme Court for review annually and over eighty argued each term, a significant, yet feasible sample of cases from both the 1999-2000 and 2001-2002 terms must be extracted for research. "Importance" is a subjective term, varying widely even between legal professionals and Supreme Court correspondents. Reaching a consensus on the most important cases from a Supreme Court term is difficult and inherently controversial. The following research will equate importance with high levels of coverage in the mainstream media and publications dedicated to the legal community. Though media coverage of the Supreme Court is far from ideal, cases covered by national periodicals represent, at a minimum, the most controversial cases of each term, in which all of the Court's actors are certainly under the highest scrutiny. To balance the mainstream media's propensity toward controversy, exposure in a respected law review will also factor into determining if a case is "high-profile." Each year the *New York Times* and the *Washington Post* Supreme Court correspondents publish an "end-of-term report" or summary of the most important (or noteworthy) cases. The *Harvard Law Review* also publishes a similar annual report. To extract the most high-profile cases of the 1999 and 2001 terms, my research design requires that a case must have warranted coverage in at least two of the three preceding publications' end-of-term reports.

The S.G.'s involvement (whether as petitioner, respondent or *amicus*) in the high-profile cases of the 1999 and 2001 terms was be measured. Of the Solicitor General's contributions to the high-profile cases, the level of agreement between his advocated conclusions and the outcome of the majority of the Court was considered Finally, the most arduous, yet instructive task of my research requires a content study of the influence of the arguments espoused by the S.G.'s briefs on the articulated legal reasoning used in the majority opinion. The most elusive level of analysis will grade the S.G.'s influence in his three roles as litigant (petitioner, respondent and *amicus*) and in fulfilling his implicit responsibilities to the Court (as advocate for the executive branch and as a source of impartial legal analysis.)

While a strictly quantitative study of the influence of the Solicitor General would probably produce concise and clear-cut results, reducing an opinion to numbers, figures and percentages would sacrifice an understanding of the full impact of an argument. Coding does not fully account for the significance, usage, emphasis, and nuances of an S.G.'s argument and its effect. To understand truly the force of the S.G.'s arguments, the language, tone, and arrangement of an opinion must be examined through content analysis.

First, the success of each of the two Solicitor General's briefs on the merits were evaluated. Next, parallels between the Solicitor General's brief and the reasoning of the majority opinion were examined. Finally, the value or prominence of the S.G.'s arguments in influencing the majority opinion were documented. Although my study will not codify the influence of the Solicitor General's arguments, the following framework describes the strategy in attributing value to the S.G.'s reasoning.

The exemplar of S.G. influence is its effect on the main argument of the majority opinion. In other words, if the S.G.'s advocacy is used in whole or in part to answer the "questions presented" by a case, persuasion probably has occurred. On a secondary level, the usage of the S.G.'s arguments in bolstering the main argument of the opinion in reconciling other controversies arising in the cases, was measured. Reference to supporting evidence used by the S.G. in his briefs on the merits, such as Court precedents, law review articles or social science data represents the third level of influence. Finally, referencing the Solicitor General in an opinion's footnotes indicates the fourth level of influence.

History of Project

During my two summer internships with the Office of the Clerk of the Supreme Court, I developed a curiosity about the role played by the Solicitor General at the Court. Members of the S.G.'s staff were constantly in the Clerk's Office, researching or filing briefs. As opinions were announced, the Solicitor General was almost always present. The motivation behind my current research initially developed from a project I was assigned during my first summer internship in the Clerk's Office. In researching the *amicus* briefs on the merits docketed during the October 2001 term, I was surprised by the level of involvement of the Solicitor General in cases in which he was not a party and the Court's practice of issuing CVSGs.

In the fall of my junior year of college, I participated in the Public Law Seminar of the Washington Semester at American University. The optional research project presented me with the opportunity to pursue lingering questions about the Solicitor General from my internship: In a Court that often seems insular, how does the Solicitor

General enjoy such a high degree of access? Why does the S.G. have such a high degree of legitimacy with the Justices? Does the “tenth justice’s” close relationship with the Court represent a degradation of the separation of powers between the executive and the judiciary? Over the course of a semester, I completed an extensive quantitative study of the influence of Solicitor General briefs on Supreme Court opinions.

I first measured S.G. involvement in the high-profile cases of the 1999 and 2001 terms. Next, I analyzed the percentage of cases in which the S.G.’s positions reflected the holding of the majority opinion. Finally, of the cases in which the S.G. and the Court “agreed” I combed through the briefs and opinions extracting legal authorities cited in both documents and measured their frequency. Not surprisingly, I found that, in cases in which the S.G. and Court “agreed,” both documents had correspondingly high levels of shared legal authorities. However, this design did not leave me, with any discretion to qualify the use of the legal authorities or the argument of the S.G. The force of an argument cannot simply be measured through the frequency it uses precedent. While quantitative analysis yields concise results, it does not fully account for the influence of an argument.

The subsequent research maintained the quantitative element of my previous study (a legitimate source of measuring success), but expanded the study to include new, relevant inquiries in to the S.G.’s influence. With the addition of content analysis of the briefs and opinions, the numerical data can be evaluated with greater relevancy. Qualitative examinations, coupled with results from quantitative research, more accurately gauge the influence of the Solicitor General over the outcomes of the Supreme Court.

Findings

Solicitor General Success in Procedural Outcomes of the Supreme Court

It has been well-documented that the Solicitor General is the most prominent external actor in the Supreme Court. His involvement in procedural-level advocacy however, has not garnered the attention of the press or academics studying the office. The importance of studying influence over the Court's decisions is clear, yet procedural-level advocacy is becoming an increasingly important aspect of Supreme Court litigation. The Court receives thousands more cases than it can possibly review each term. Pressure over which cases are granted *certiorari* (or which cases are not reviewed) is an important, yet often overlooked, aspect of Supreme Court practice.

The following tables demonstrate the success of the Solicitor General in filing his petitions for *certiorari*. In the 1999 term Seth Waxman filed twenty-five petitions for *certiorari*, of which the Court granted review to eleven. Olson filed nineteen petitions of review in 2001, and the Court granted *certiorari* to nine. A comparative analysis between the two terms of the S.G.'s *certiorari* success does not reveal significant differences between the Democratic- and Republican-appointed S.G. The Solicitor General is often labeled the "gatekeeper" of government litigation to the Supreme Court. The subsequent findings reveal that, although the Solicitor General has exponentially higher acceptance rates than the average petition (less than .5% for *in forma pauperis* petitions, 1% for "paid" petitions for *certiorari*), a request for appeal by the Solicitor General is not automatically granted. In fact, the "gatekeeper" analogy loses some credibility with the results as the acceptance rate of the S.G.'s previewed petitions hovers around or below fifty percent

Result of Petitions for *Certiorari* to the Supreme Court, 1999-2000*Seth Waxman as Solicitor General*

<i>Certiorari</i> Granted (11)	<i>Certiorari</i> Denied (14)
<i>United States v. Locke</i> , 529 U.S. 89	<i>Reno v. Pryor</i> , 99-61
<i>United States v. Morrison</i> , 529 U.S. 598	<i>United States v. SCS Business & Technical Institute</i> , 99-213
<i>United States v. French</i> , 460 NW.2d 2	<i>United States v. County of Cook</i> , 99-345
<i>United States v. Velazquez</i> , 164 F.3d 757	<i>United States v. Texas Tech. University</i> , 99-365
<i>Browner v. American Trucking Association</i> , 531 U.S. 457	<i>United States v. Texas</i> , 99-774
<i>United States v. Mead</i> , 533 U.S. 218	<i>DeBose v. Nebraska</i> , 99-940
<i>NLRB v. Kentucky River Community Care</i> , 532 U.S. 706	<i>United States v. Reed</i> , 99-1096
<i>EEOC v. Waffle House</i> , 534 U.S. 279	<i>United States v. Johnson</i> , 99-1266
<i>U.S. Department of the Interior v. Klamath Water Users Protective Association</i> , 532 U.S. 7	<i>United States v. Texas Southern University</i> , 99-1544
<i>Saucier v. Katz</i> , 533 U.S. 194	<i>United States v. Farley</i> , 99-1675
<i>United States v. Hatter</i> , 532 U.S. 557	<i>United States v. Vopper</i> , 99-1728
	<i>United States v. Ahumada-Aguilar</i> , 99-1872
	<i>Houston v. Kilpatrick</i> , 99-2008
	<i>United States v. Board of Governors</i> , 99-2077

Result of S.G. Petitions for *Certiorari* to the Supreme Court, 2001-2002*Theodore Olson as Solicitor General*

<i>Certiorari</i> Granted (15)	<i>Certiorari</i> Denied (12)
<i>HUD v. Rucker</i> , 237 F. 3d 1113	<i>Stern v. Royster</i> , 01-100
<i>United States v. Craft</i> , 233 F.3d 358	<i>Thoms v. Rosales-Garcia</i> , 01-285
<i>Massanari v. Walton</i> , 533 U.S. 976	<i>Potter v. Fitzgerald</i> , 01-373
<i>SEC v. Zandford</i> , 536 U.S. 862	<i>United States v. California Federal Bank</i> , 01-698
<i>Thompson v. Western States Medical Center</i> , 238 F.3d 1090	<i>Commissioner v. Estate of Branson</i> , 01-928
<i>United States v. Fior D'italia</i> , 242 F.3d 844	<i>United States v. Boeing Sales Corporation</i> , 01-1382
<i>United States v. Ruiz</i> , 74 F. 3d 107	<i>Elwood v. Radoncic</i> , 01-1459
<i>United States v. Drayton</i> , 536 U.S. 194	<i>United States v. Bass</i> , 01-1471
<i>United States v. Cotton</i> , 535 U.S. 625	<i>DeMore v. Kim</i> , 01-1491
<i>Barnhart v. Peabody Coal</i> , 14 Fed. Appx. 393	<i>Comfort v. Hoang</i> , 01-1616
<i>United States v. White Mountain Apache Tribe</i> , 249 F.3d 1364	<i>Comfort v. SOSA</i> , 01-1752
<i>United States v. Navajo Nation</i> , 263 F.3d 1325	<i>INS v. Yi Quan Chen</i> , 02-25
<i>United States v. Recio</i> , 258 F.3d 1069	
<i>United States v. Bean</i> , 253 F.3d 234	
<i>FCC v. NextWave</i> , 254 F.3d 130	

Several times each term, the Court extends an invitation to the Solicitor General to offer his views on a petition for *certiorari*. The subsequent research does not reveal a significant difference between the invitations issued to Waxman (ten CVSGs) in 1999 or to Olson (nine CVSGs) in 2001. Thus, neither the individual Solicitors General nor their party affiliation was a motivation for issuing CVSGs during the two terms. The practice indicates a general respect for the legal advice of the Solicitor General as an institution, not necessarily for the individuals who populated the office each term. Extending around ten invitations each term also indicates that CVSGs are not an obscure occurrence on the docket, but rather a respected resource aiding in the enormous task of selecting petitions to review.

Invitations to Submit *Amicus Curiae* on Petitions for *Certiorari*
Calls for the View of the Solicitor General (CVSG)

1999-2000 Term: Waxman	2000-2001 Term: Olson
<i>Christensen v. Harris County</i> , 98-1167	<i>Chevron USA. v. Echazabal</i> , 00-1406
<i>Salt River Project AIPD v. Dawavendewa</i> , 98-1628	<i>Kentucky Plans. v. Miller</i> , 00-1471
<i>Perez v. Pasadena Independent School District</i> , 98-1747	<i>John Deere v. Nueva</i> , 00-1842
<i>Buckman Co. v. Plaintiffs' Legal Commission</i> , 98-1768	<i>Memorial Hospitals Association v. Humphrey</i> , 00-1860
<i>US Healthcare Systems v. Pennsylvania Hospital Institute</i> , 98-1836	<i>Pharmaceutical Research v. Concannon</i> , 01-188
<i>Robinson v. Administrative Commission of Sea Ray ESOP</i> , 98-1971	<i>Yellowfreight System v. Michigan</i> , 01-270
<i>Valdespino v. Alamo Heights Independent School District</i> , 98-1987	<i>Dole v. Patrickson</i> , 01-593
<i>Domingues v. Nevada</i> , 98-8327	<i>Chase Manhattan v. Traffic Stream</i> , 01-651
<i>Davis v. Hopper</i> , 98-9663	<i>Fin Control Systems v. Surfco Hawaii</i> , 01-830
<i>Armstrong Surgical Center v. Armstrong County Memorial Hospital</i> , 99-905	

The results from petitions in which the S.G. issued a CVSG do not represent an overwhelming influence over the Court's decisions. In 1999-2000 seven of Waxman's ten invited *amicus* briefs were decided in accordance with his advocated conclusion. In 2001-2002 the Court affirmed five of Olson's CVSG conclusions. Interestingly, the following results reveal that the S.G. is quite conservative in advising the Court that an external petition should be granted *certiorari*. In 1999 and 2001 Waxman and Olson both advised that Court that only five of the petitions warranted review.

Result of CVSG on Petitions for *Certiorari*
1999-2000 Term: Solicitor General Waxman
Bolded titles indicate grant of *certiorari*

Disposed in Agreement with CVSG	Disposed in Opposition with CVSG
<i>Christensen v. Harris County</i> , 529 US 576 <i>Salt River Project AIPD v.</i> <i>Dawavendewa</i> , 98-1628 <i>Perez v. Pasadena Independent School</i> , 98-1747 <i>Buckman Co. v. Plaintiffs' Legal Commission</i> 531 US 341 <i>Robinson v. Administrative Comm. Of Sea Ray ESOP</i> , 98-1971 <i>Domingues v. Nevada</i> , 98-8327 <i>Davis v. Hopper</i> , 98-9663	<i>Armstrong Surgical Center v. Armstrong County Memorial Hospital</i> , 99-905 <i>U.S. Healthcare Systems v. Pennsylvania Hospital Institute</i> , 98-1836 <i>Valdespino v. Alamo Heights Independent School District</i> , 98-1987

Result of CVSG on Petitions for *Certiorari*
2001-2002 Term: Solicitor General Olson
Bolded titles indicate a grant of *certiorari*

Disposed in Agreement with CVSG	Petitions in Opposition with CVSG
<i>Chevron USA v. Echazabal</i> , 226 F.3d 1063 <i>John Deere v. Nueva</i> , 00-1842 <i>Memorial Hospitals Association v. Humphrey</i> , 00-1860 <i>Yellowfreight System v. Michigan</i> , 627 N. W. 2d 236 <i>Fin Control Systems v. Surfco Hawaii</i> , 01-830	<i>Kentucky Plans. v. Miller</i> , 227 F.3d 352 <i>Pharmaceutical Research v. Concannon</i> , 01-188 <i>Dole v. Patrickson</i> , 01-593 <i>Chase Manhattan v. Traffic Stream</i> , 01-651

Because the Solicitor General voluntarily files many *amici* briefs each term on the merits of a case, the Court rarely asks the office to submit an *amicus* during the decision-making stage. In 1999 the Court only solicited one *amicus* on the merits level in *Christensen v. Harris City, Texas*⁸³ which the majority opinion affirmed Waxman's conclusion in his CVSG. In 2001 the Court again asked for only one *amicus* on the merits: *Wisconsin v. Blumer*,⁸⁴ in which the majority again affirmed the suggestion of the Solicitor General's CVSG.

My final procedural test extracts the most high-profile cases of both the 1999 and 2001 terms. These cases form the foundation of the subsequent content analysis. My methodology revealed twelve high-profile cases for 1999; of which the S.G. was involved (either as petitioner, respondent, or *amicus*) in seven. In 2001 the media again recognized twelve cases, of which Olson was involved in eight

⁸³ 529 U.S. 576 (2000).

⁸⁴ 534 US 473 (2002).

High Profile Cases 1999 Term	S.G. Involvement in High Profile Cases
<i>Stenberg v. Carhart</i> , 530 US 914 <i>Boy Scouts of America v. Dale</i> , 530 US 640 <i>Troxel v. Granville</i> , 530 US 57 <i>Santa Fe Independent School District v. Doe</i> , 530 US 290 <i>Mitchell v. Helms</i> , 530 US 793 <i>Dickerson v. United States</i> , 530 US 428 <i>FDA v. Brown Williamson</i> , 529 US 120 <i>California Democratic Party v. Jones</i> , 530 US 567 <i>Nixon v. Shrink Missouri PAC</i> , 528 US 377 <i>United States v. Playboy Entertainment</i> , 529 US 803 <i>United States v. Morrison</i> , 529 US 598 <i>Apprendi v. New Jersey</i> 530 US 466	<i>Stenberg v. Carhart</i> , 530 US 914 <i>Mitchell v. Helms</i> , 530 US 793 <i>Dickerson v. United States</i> , 530 US 428 <i>FDA v. Brown Williamson</i> , 529 US 120 <i>United States v. Playboy Entertainment</i> , 529 US 803 <i>United States v. Morrison</i> , 529 US 598 <i>Apprendi v. New Jersey</i> , 530 US 466

High Profile Cases 2001 Term	S.G. Involvement in High Profile Cases
<i>Zelman v. Simmons Harris</i> 536 US 639 <i>Republican Party of Minnesota v. White</i> 536 US 765 <i>McKune v. Lile</i> 536 US 24 <i>Board of Education v. Earls</i> 536 US 822 <i>Ashcroft v. Free Speech Coalition</i> 535 US 234 <i>Atkins v. Virginia</i> 536 US 304 <i>United States v. Drayton</i> 536 US 194 <i>Utah v. Evans</i> 182 F. Supp. 2d <i>Alabama v. Shelton</i> 535 US 654 <i>Bell v. Cone</i> 535 US 685 <i>Ring v. Arizona</i> 536 US 584 <i>Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency</i> 535 US 302	<i>Zelman v. Simmons Harris</i> 536 US 639 <i>McKune v. Lile SG</i> 536 US 24 <i>Board of Education v. Earls</i> 536 US 822 <i>Ashcroft v. Free Speech Coalition</i> 535 US 234 <i>United States v. Drayton</i> 536 US 194 <i>Utah v. Evans</i> 182 F. Supp. 2d <i>Bell v. Cone</i> 535 US 685 <i>Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency</i> 535 US 302

B. *Solicitor General Success over Decision-Making Outcomes of the Supreme Court*

The Solicitor General is the only public officer who must show deference to all three branches of the federal government. His responsibilities are complex and include multiple roles at the Supreme Court. While the success of Solicitor General advocacy in both procedural and decision-making levels lends itself to quantitative study, gauging influence over the outcomes of the Court is more elusive. In the following fifteen high-profile cases (seven from the 1999-2000 Term and eight from the 2000-2001 term), congruence and patterns of influence were be traced between the Solicitor General's merit briefs (as petitioner, respondent, or *amicus*) and the majority opinion issued by the Court. Comparison between the Solicitor General's advocated position and the decision of the Court is the primary level of analysis. Together with the results from procedural-level analysis, the "success" of the Solicitor General can be measured by agreement between the Solicitor General's arguments and the decisions made by the Court. The content analysis section of my study measures the Solicitor General's degree of influence over the articulated legal reasoning, or argument of the majority opinion. Examining the majority opinion in the context of the S.G.'s brief reveals parallels in argumentation between the government advocacy and the Court's opinions. A more elusive level of analysis will deduce the most effective role or roles adopted by the Solicitor General in his advocacy. Finally, the Court's support for the Solicitor General in his implicit responsibilities also indicates another level of influence over Supreme Court decisions.

The Solicitor General has multiple responsibilities to the separate branches of government. In practice he has exhibited several different "roles" in his litigation before the Supreme Court. The Solicitor General is the advocate for the president and the

incumbent administration. He has the responsibility to advance the policy priorities of his appointing president before the Supreme Court. At the same time, the S.G. proceeds in advocacy before the Court under the expectation of providing high-quality and unbiased legal reasoning. The S.G. and the Supreme Court have a symbiotic relationship. Without the aid of physical force, the Supreme Court depends on the executive branch to enforce its opinions. The Solicitor General has also adopted the role of providing the Court with information about the possible impact of their decisions on the executive branch. In the two selected terms, the Solicitor General employs all of his roles, sometimes simultaneously. The success, and overall influence of the Solicitor General while fulfilling his various responsibilities were examined.

– Often the Solicitor General roles are commanded by their function in the case, namely as petitioner, respondent, or *amicus curiae*. The S.G. occupies four basic roles before the Supreme Court. Listed in descending order of the S.G.’s discretion, the roles are: as voluntary *amicus* party, petitioner, invited *amicus* and respondent.

Legal scholars explain that the Solicitor General is probably the only true “friend of the court” of all the *amicus* filers. Not only does the relationship between the Solicitor General and the Justices represent a friendship, but all other *amici* i.e., counsel from law firms, corporations, public interest groups, even private individuals, file with the intention of supporting one party or the other. The Solicitor General’s responsibilities are greater, he must provide the Court with impartial legal reasoning and the implications of a decision on common law and the executive branch. The S.G. as *amicus* is a role which can encompass all of the officer’s roles simultaneously. While the administration expects him to propose decisions in conjunction with the president’s agenda, to retain his

legitimacy with the Court, the Solicitor General must offer as high-quality and impartial legal advice as possible. As *amicus*, the S.G. may argue the merits of both the respondents and petitioners' cases before making a conclusion, or compensate for a party that has not offered enough evidence or reasoning.

In his role as petitioner, the S.G. has several advantages. Considering the Court's aforementioned low review-granting rate (less than one percent of the petitions filed with the Clerk each year are granted review by the Court), as petitioner in the decision-making component of Supreme Court practice, the Solicitor General has already won the Court's attention. Because the S.G. does not appeal all of the government's losses, the office is given a higher degree of credibility. When the S.G. files a petition for *certiorari*, the Justices know it has already been scrutinized and deemed significant by the most elite legal minds. As petitioner, the Solicitor General is in "the driver's seat," as opposed to his role as respondent in which he must defend the government's actions/laws. The S.G.'s discretion in filing CVSGs is also diminished, as an invitation from the Supreme Court will not to be refused.

October Term 1999-2000 High Profile Cases

Seth Waxman as Solicitor General

Waxman as *Amicus Curiae*

One of the most high-profile cases of the October 1999 term was *Apprendi v. New Jersey*.⁸⁵ Petitioner Charles Apprendi fired several shots into the home of an African-American family that had recently moved into his neighborhood. When taken into custody, Apprendi admitted he had fired bullets into the home because he did not want the family in his neighborhood on account of their race. Later, Apprendi retracted this confession. He was initially charged with second-degree possession of a firearm for an unlawful purpose. After Apprendi plead guilty, the district attorney filed a motion to enhance the sentence to include penalties prescribed by New Jersey's hate crimes statute. The trial court found that the crime was racially motivated and convicted Apprendi on account of his confession. The judge sentenced him to twelve years in jail. Apprendi appealed his decision to the Supreme Court of New Jersey, which ultimately upheld his enhanced sentence. The question presented to the U.S. Supreme Court in *Apprendi* was: "Whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." In a narrow 5-4 opinion authored by Justice Stevens, the Court held that the Due Process Clause requires any fact that increases the penalty for a crime beyond the maximum allowed by the statute, other than facts from a prior convictions, must be submitted to a jury and proved beyond a reasonable doubt.

⁸⁵ 530 U.S. 466 (2000).

In his *amicus*, Solicitor General Waxman argued that the definition “of the elements of a criminal offense are entrusted to the legislature.” However, the S.G. argued that when a judge is sentencing a convicted criminal, he must consider and apply the “fullest possible information about the offense and offender.” The S.G. asserted that petitioner’s argument that every fact must be presented before a jury contradicts the legal traditions of the United States. Additionally, the petitioner’s argument “impinge[d] on legislative prerogative to guide the administration” of justice for the proscribed crime. In essence, the S.G. argued that the Court should overturn *Jones v. United States*,⁸⁶ claiming that the rules established by this precedent do not serve any constitutional purpose. The Solicitor General’s *amicus* brief stated that the rules created by *Jones* conflicted with three lines of rationale in the Court’s precedent: 1) upholding the legislature’s designation of sentencing factors that mandate a minimum sentence, 2) the federal sentencing guidelines system, and 3) capital punishment schemes in which aggravating factors that qualify the convict for the death penalty are presented only at the sentencing phase after trial. The S.G. argued that once a defendant had been convicted, the state’s burden shifts from proving guilt beyond a reasonable doubt to the “question of determining an appropriate sentence.”⁸⁷

The majority of the Court emphatically rejected overturning *Jones*, barely one year old, when the decision was handed down in *Apprendi*. The opinion argued that *Jones* “made crystal clear” that the practice of applying new facts in the sentencing phase was unconstitutional. In *Jones*, the Court held that “under the Due Process Clause of the

⁸⁶ 526 US 227 (1999).

⁸⁷ All quotations are from the Solicitor General’s *amicus* brief for *Apprendi v. New Jersey*, << <http://www.usdoj.gov/osg/briefs/1999/3mer/lami/99-0478.mer.ami.html>>>.

Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt.”⁸⁸ Additionally, the majority rejected the Solicitor General’s assertion that *Jones* was a misguided departure from the Court’s precedent. Stevens concluded that the Court’s “reexamination of ... cases in this area, and of the history upon which they rely, confirms the opinion ... expressed in *Jones*” to be relevant to *Apprendi*. The majority did not explicitly reference arguments made by the Solicitor General in the body of the opinion or in the footnotes. Instead, Stevens concentrated on discrediting respondent New Jersey’s three-part defense of the hate crime enhancement statute.

Another of the most controversial cases of the 1999 term, *Stenberg v. Carhart*,⁸⁹ dealt with the nationally polarizing subject of abortion. Solicitor General Seth Waxman filed an amicus *curiae* to explain and advocate the interest of the government. After losing at the District Court and Court of Appeals for the Eighth Circuit, Don Stenberg, Attorney General of Nebraska, appealed to the United States Supreme Court. At issue in *Stenberg v. Carhart* was the Nebraska law prohibiting “partial-birth abortions,” or the dilation and extraction procedure (D&X). Violation of the law was a state felony carrying a maximum penalty of twenty years in prison. A conviction would automatically revoke a physician’s state medical license. Respondent and Nebraska physician Leroy Carhart argued that the statute was unconstitutionally vague and placed an undue burden on

⁸⁸ All references to the Supreme Court majority opinion may be found at the Cornell Law School’s Legal Information Institute, *Apprendi v. New Jersey*, <<<http://supct.law.cornell.edu/supct/search/display.html?terms=Apprendi&url=/supct/html/99-478.ZO.html>>>.

⁸⁹ 530 U.S. 914 (2000).

female patients seeking abortions and on doctors performing the procedures. The question presented to the Court was: “Does the Nebraska statute, which makes the performance of a ‘partial-birth abortion’ a crime, violate the liberty protected by due process of the Fourteenth Amendment in the U.S. Constitution?” In another closely divided opinion, the Court issued a 5-4 opinion by Justice Breyer, holding the Nebraska statute unconstitutional as interpreted under precedents established in *Planned Parenthood v. Casey*⁹⁰ and *Roe v. Wade*.⁹¹ The delicate census required in securing a majority in this case is evident in the three written concurrences (by Justices O’Conner, Stevens and Ginsburg) and four separate dissents (by Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy) that were filed with the Court’s official opinion.

Citing the government’s responsibility in “certain circumstances” to provide or pay for abortion services, Solicitor General Seth Waxman filed an *amicus curiae* brief on behalf on the United States. The S.G. provided three arguments why the Nebraska statutory ban on “partial-birth abortions” was unconstitutional. First, the definition of partial-birth abortion was so broad “that it reaches the abortion procedure most commonly used in the second trimester of pregnancy... [and] in some circumstances may also reach the procedures used in the first trimester.”⁹² Second, the S.G. argued that the statute was unconstitutionally vague because “partial-birth abortion” is neither a universally accepted medical term nor “a term of art with common-law roots.” Finally, even if the statute was limited to include only the D&X procedure, it would be unconstitutional in failing to provide an exception to preserve the health of the woman.

⁹⁰ 505 U.S. 833,(1992).

⁹¹ U.S. 113 (1973).

⁹² Solicitor General amicus brief, *Stenberg v. Carhart*,
<<<http://www.usdoj.gov/osg/briefs/1999/3mer/1ami/99-0830.mer.ami.html>>>.

In a majority opinion heavy with “technical distinctions among different abortion procedures,” Justice Breyer concluded that the Nebraska ban was unconstitutional “for at least two independent reasons.”⁹³ Implying that more constitutional violations may exist in the Nebraska law, but tailoring the majority opinion to include only two “independent reasons” again implicates a contentious majority. The Court found Nebraska’s law unconstitutional as it lacked any exception for the preservation of the health of the pregnant women and imposed an “undue burden” on a her ability to choose a dilation and evacuation procedure (D&E, the method accounting for 95% of all abortion procedures performed during the second trimester) and, thereby, violated a woman’s constitutional right to choose to terminate her pregnancy.

— Announced on June 28, 2000, the Court’s decision in *Stenberg v. Carhart* was undoubtedly a victory for Solicitor General Waxman. The majority’s opinion reflected the conclusion argued in his *amicus* brief. Beyond this immediate indication of success, a high level of agreement is also clear between the S.G.’s arguments and the Court’s articulated legal reasoning. Two of the three constitutional violations demonstrated in the S.G.’s brief served as the principal support for the majority opinion, namely, the undue burden imposed on the mother in exercising her right to an abortion (established by precedent in *Casey* and *Roe*) and the law’s lack of an exception to preserve the health of the mother (*Casey*).

In order to distinguish the procedure(s) that would be illegal under the partial-birth abortion ban, the majority presented graphic technical detail, describing the abortion

⁹³ Supreme Court majority opinion, *Stenberg v. Carhart*, <<<http://supct.law.cornell.edu/supct/search/display.html?terms=Stenberg&url=/supct/html/99-830.ZO.html>>>.

methods used before and after viability. The Court found that in certain circumstances, the D&X procedure can be beneficial in removing even non-viable fetuses with conditions such as hydrocephaly (abnormal fluid accumulation in the brain) and for women suffering prior uterine scars. Justice Breyer refuted Justice Thomas's dissenting argument that health exception is relevant only when the pregnancy itself is a threat. If the state prevents a woman from receiving a safe abortion procedure, the government is in effect, endangering her life. The Court agreed with respondents in dismissing Nebraska's claim that "safe alternative[s] remain available" to women if D&X is outlawed.

The Court rejected Nebraska's eight arguments against the requirement of a health exception as "never necessary to preserve the life of the woman." Siding with respondents and the S.G., the Court concluded that the state legislature did not intend the law to apply only to D&X. In defeating another of the petitioner's leading arguments, the Court was adamant that Nebraska's Attorney General Stenberg's "interpretative views" over the laws passed by the state legislature do not constitute controlling judicial significance.

On the surface, it may appear that the majority opinion only accepted two of the three Solicitor General arguments against the Nebraska law (the undue burden and health exception). Yet Justice Breyer also used the Solicitor General's third argument (the term "partial-birth abortion" is unconstitutionally broad), albeit as secondary support for the opinion. By denying Nebraska's Attorney General the authority to interpret the term "partial-birth abortion" after the law had passed, the Court is implicitly affirming that the term was unconstitutionally broad.

Waxman as Petitioner

Representing the Secretary of Education, Seth Waxman was again counsel of record for the petitioner's briefs on the merits in *Mitchell v. Helms*,⁹⁴ another 1999 term case garnering intense media attention. At issue in the case was an alleged violation of the First Amendment Establishment Clause. Through a federal school aid program known as "Chapter 2" (referring to Chapter 2 of the Consolidation and Improvement Act of 1981), the government distributes funds to state and local agencies, which reallocate the money to lend educational and instructional materials to public and private schools. As many of the private schools receiving Chapter 2 aid are religiously affiliated, the question presented in the controversy was: "Whether Chapter 2 of the Education Consolidation and Improvement Act of 1981 violates the Establishment Clause of the First Amendment." Respondent Mary Helms and other parents of public school children in Jefferson Parish, Louisiana, filed suit against Mitchell, President Clinton's Secretary of Education, arguing that the aid received by parochial schools as a result of Chapter 2 was a violation of the constitutional prohibition against the establishment of a national religion. A 6-3 plurality opinion by Justice Thomas held that Chapter 2 does not violate the Establishment Clause of the First Amendment. Concentrating on Chapter 2's neutrality in the dispersal of aid, Thomas wrote that, "if the religious, irreligious, and areligious are all eligible for governmental aid, no one would conclude that any indoctrination"⁹⁵ that may occur is a result of the government.

While the Solicitor General conceded that the U.S. District and Court of Appeals

⁹⁴ 530 U.S. 793 (2000).

⁹⁵ Supreme Court majority opinion, *Mitchell v. Helms*,
<<<http://supct.law.cornell.edu/supct/html/98-1648.ZO.html>>>.

for the Fifth Circuit correctly ruled against Chapter 2 in light of *United States v. Meeks*,⁹⁶ and *Wolman v. Walter*,⁹⁷ he challenged the Justices to decide *Mitchell* in accordance with the more recent precedent established in *Agostini v. Felton*.⁹⁸ The result of *Meeks* and *Wolman* was a blanket rule that “flatly prohibited public authorities from lending instructional equipment and materials to religious schools for the benefit of their students.” The S.G. argued that Chapter 2 should be decided in accordance with more recent Establishment Clause jurisprudence, namely the three-part test established in *Agostini*.⁹⁹ The S.G. explained that *Agostini* was more relevant to the Chapter 2 controversy than *Meeks* and *Wolman* which, in applying the blanket rule, did not take the neutrality of the aid “that neither favors nor disfavor[s] religion” into consideration. In response to the test established in *Lemon v. Kurtzman*,¹⁰⁰ the S.G. advocated that Chapter 2 safeguards did not result in “excessive entanglement” between the government and religious schools.¹⁰¹

In his petitioner’s brief on the merits, the S.G. first suggested that the Court remand the case to the Court of Appeals in light of the ruling in *Agostini*. Waxman contended that the judgment of the Court of Appeals should be reversed by the Supreme Court to conclude that the program was neutral in its application of aid to secular and

⁹⁶ 857 F.2d 1201, 1203 (1988).

⁹⁷ 433 U.S. 229 (1977).

⁹⁸ 521 U.S. 203 (1997).

⁹⁹ “Whether equipment and materials lent to a religious school by public authorities will be used for the inculcation of religion; whether such aid is provided in a manner that favors or disfavors religious schools; and whether the aid indirectly results in a subvention of religion by enabling a religious school to shift significant resources to sectarian functions.”

¹⁰⁰ 403 U.S. 602 (1971).

¹⁰¹ Solicitor General petitioner brief, *Mitchell v. Helms*,
<<<http://www.usdoj.gov/osg/briefs/1999/3mer/2mer/98-1648.mer.aa.html>>>.

religious schools. Furthermore, the S.G. criticized respondents for not demonstrating that the program's safeguards were sufficient to prevent diversion of equipment for religious purposes. Neither had respondents demonstrated that Chapter 2 contributed more than supplementary aid to the religious schools. In accordance with criteria established in *Lemon*, the S.G. argued that the safeguards implemented by local educational authorities did not constitute "pervasive monitoring of religious schools by public authorities." The Solicitor General also used *Bowen v. Kendrick*¹⁰² and *Rosenberger v. Rector and Visitors of the University of Virginia*¹⁰³ to emphasize the Court's acknowledgement of the neutrality of the programs at issue in those cases.

The Court declined the S.G.'s initial suggestion to remand the case in light of the decision in *Agostini*. However, the majority ruled in accordance with the conclusion urged by the Solicitor General, namely that the decision from the Fifth Circuit be overturned. As Waxman's argument focused on the program's adherence to *Agostini* standards, a parallel Court decision was preferable to the interest of the government than its initial suggestion of a remand to the Court of Appeals. Justice Thomas, writing for the Court, repeatedly criticized that respondents had "inexplicably" failed to address Chapter 2 under the *Agostini* test. Obviously, the prominence given to the three-part test established in *Agostini*, rather than the "blanket-rule" precedent of the *Meeks* and *Wolman* cases, was highly influential in the reasoning behind the decision of the majority.

The parallels between the petitioner's brief and the majority opinion are clear; both documents stress the relevance of the *Agostini* test and the neutrality of the Chapter

¹⁰² 487 U.S. 589, 614-615 (1988).

¹⁰³ 515 U.S. 819 (1995).

2 program. While Thomas frequently addressed the shortcomings in the respondent's brief, he mentioned the petitioner (the S.G.), only once. In the final footnote, Thomas lauds the S.G.'s assertion that to "require exclusion of religious schools from [Chapter 2] would raise serious questions under the Free Exercise Clause." This footnote demonstrated the majority's approval of the Solicitor General acting in his role of executive branch advisor to the Court. The prominence of the Solicitor General's arguments, as the principal support for the majority opinion and in supporting legal reasoning, clearly indicates the office's high degree of influence over the Court in *Mitchell*.

In 1999 journalists also focused considerable attention to *FDA v. Brown and Williamson Tobacco Corporation*,¹⁰⁴ a case with the potential to revolutionize the regulation of tobacco productions in the United States. Under the Food, Drug and Cosmetic Act of 1938 (hereafter FDCA, the legislation creating the Food and Drug Administration's authority), in 1996 the FDA attempted to expand its power to regulate tobacco products by reasoning that nicotine is a "drug" and cigarettes and other tobacco products are the "devices" delivering nicotine to its users. The consequences of this self-grant of authority was the FDA's promulgated regulations over tobacco products and their labeling, advertisement, and accessibility to children. A group of tobacco manufacturers, headed by Brown & Williamson Tobacco Corporation, filed suit against the FDA's attempt to regulate tobacco as it has been traditionally marketed in the U.S.¹⁰⁵ The U.S. District Court for the Middle District of North Carolina upheld the FDA's

¹⁰⁴ 529 U.S. 120 (2000).

¹⁰⁵ The traditional method of advertising tobacco was without manufacturer advertising any therapeutic health benefit by smoking.

authority over controlling tobacco as a device, but not the product's marketing. The reversal by the U.S. Court of Appeals for the Fourth Circuit held that Congress had not granted the FDA control over tobacco. The question presented to the Supreme Court in *FDA v. Brown William Tobacco Corporation* was: "Does the Food and Drug Administration have the authority to regulate tobacco products as 'drugs and devices' under the Food, Drug and Cosmetic Act?" A closely divided Court issued a 5-4 opinion delivered by Justice O'Connor. The majority of the Court concluded that Congress had not granted the FDA authority to regulate the marketing of tobacco products. While never diminishing the detrimental effect of smoking on health, O'Connor wrote that the regulatory scheme created by Congress rejected the FDA's authority and any other governmental agencies' authority over the sale of tobacco.

Despite support from a virtual army of attorneys from the Solicitor General's Office and the Food and Drug Administration, Seth Waxman's advocacy to retain the FDA's self-granted authority over tobacco was unsuccessful. While the injurious effects of smoking on human health may seem to be an advantage in arguing for tobacco regulation, the S.G. had to apply a tremendously expansive view of the FDCA in his advocacy. His petitioner's brief argued that the absence of congressional legislation explicitly delegating the FDA authority over tobacco did not preclude the agency from adopting the regulation over tobacco products. "The Constitution requires Congress to express its will through enacted legislation, not unexpected bills."¹⁰⁶ The S.G.'s brief astutely predicted that the Court would confront the potential ban of tobacco if the product came within the authority of FDA regulation. FDCA requires the agency to

¹⁰⁶ Supreme Court majority opinion, *FDA v. Brown Williamson*, <<<http://supct.law.cornell.edu/supct/html/98-1152.ZO.html>>>

dispense “directions that could adequately protect consumers.” Because “there are no directions that could make tobacco products safe for obtaining their intended affect,”¹⁰⁷ if the FDA was to maintain its primary responsibility to protect consumers, the agency would be required to severely regulate or completely ban tobacco. In response to the agency’s conundrum, the S.G. made a meek argument that “an agency is always free to changes its position on an issue, however, as long as it provides a reason explanation justifying the change.”¹⁰⁸ This proclamation completely ignored the intention of Congress in creating the FDA and undermined the authority of the agency.

The Court contended that although heavily debated in the briefs on the merits, the “intention” of tobacco marketing was a moot point. Thus, the dedication of the S.G.’s petitioner’s brief to describing that tobacco is a drug and the intention of its manufacturers is to sedate, stimulate, etc., was irrelevant. The majority opinion found that “the FDA’s claim to jurisdiction contravenes the clear intent of Congress.” Rejecting the S.G.’s arguments, the majority opinion utilized the traditional framework used in controversies in which an agency is altering the statute which administers its authority, as established in *Chevron U.S.A. v. Natural Resources Defense Council Inc.*¹⁰⁹ Because Congress has not explicitly addressed the questions “a reviewing Court must respect the agency’s construction as long as it is permissible.” However, the majority found that to the contrary, not only had Congress “directly spoken to the issues” presented in *FDA v. Brown Williamson* but it had intentionally precluded FDA authority over the regulation of tobacco. The Court asserted that under the requirements of FDCA, the FDA would be

¹⁰⁷ 529 U.S. 128 (2000)

¹⁰⁸ Solicitor General petitioner brief, *FDA v. Brown Williamson*,

<< <http://www.usdoj.gov/osg/briefs/1999/3mer/2mer/98-1152.mer.aa.html>>>.

¹⁰⁹ 467 U.S. 837 (1984)

forced to ban tobacco, as it would be determined a “Class III” device, mandating FDA pre-market approval. The FDA must show “a reasonable assurance that such device is safe under the conditions of use prescribed, recommended or suggested on the labeling.” Such a guarantee would be impossible in light of the FDA’s own admissions of the extreme danger of nicotine to human health, and thus the agency would be required to ban tobacco.

O’Connor wrote that Congress had already removed the possibility of banning tobacco, as the legislature had cited the product as “one of the greatest basic industries of the United States.” Additionally, Congress had directly addressed tobacco by passing six federal regulatory tobacco laws. The Court rejects the Solicitor General’s argument that the lack of Congressional legislation on FDA regulation of tobacco did not prevent the agency from assuming this authority. Conversely, “Congress ha[d] directly spoken to the precise question,” and furthermore, “Congress ha[d] consistently denied the regulatory power of tobacco to the FDA.” The majority concluded that while the severity of tobacco’s effect on the nation’s health is significant, it does not allow an administrative agency of Congress to usurp the power of the legislative body that created it.

Both the infamous respondent and the highly controversial subject matter of *United States v. Playboy Entertainment*¹¹⁰ caught significant media attention in the 1999 term. The Playboy Entertainment Group filed a lawsuit in 1996 challenging the constitutionality of Section 505 of the Communications Decency Act (CDA) passed in the same year. Section 505 of the CDA required cable operators to block channels “primarily dedicated to sexually-oriented programming” during designated times when young

¹¹⁰ 529 U.S. 98 (2000).

children would be watching television to prevent “signal bleed,” when audio or visual from scrambled programming may be seen or heard over basic cable channels. The District Court found that the CDA violated the First Amendment’s protection of speech, as the government could further its interest by using less restrictive measures. The question presented to the Court in *United States v. Playboy Entertainment* was: “Whether Section 505 of the Communications Decency Act of 1996 is the least restrictive means to block the transmission of cable television channels primarily dedicated to sexually oriented programming, such that it does not violate the First Amendment.” Another narrow 5-4 majority found that the requirements of Section 505 of the Communications Decency Act violated the First Amendment’s free speech guarantee. The Court, in an opinion delivered by Justice Kennedy, found the restriction to be “content-based.” which requires the government to find the least restrictive alternative available to serve its interest.¹¹¹

Though ruling against the United States, the majority frequently referenced the petitioner’s brief by the Solicitor General in its opinion. However, in a departure from most of the Solicitor General’s litigation in 1999, the majority opinion is openly critical of Waxman’s argument. Kennedy wrote that “the Government has failed to show that Section 505 is the least restrictive means for addressing a real problem; and the District Court did not err in holding the statute volatile of the First Amendment.” In other cases in which the government had received an adverse ruling, the majority seemed to give concessions to the argument of the Solicitor General, seemingly to recognize the high quality of his reasoning. In *Playboy* however, the Court gave very little credence to the

¹¹¹ Supreme Court majority opinion *United States v. Playboy Entertainment*, << <http://supct.law.cornell.edu/supct/html/98-1682.ZO.html>>>.

advocacy of the Solicitor General. In one of the more striking criticisms of the S.G.'s petitioner's brief, Kennedy alleged that "the Government relied... on anecdotal evidence to support its regulation."

The Solicitor General had argued that "[u]nlike in other First Amendment contexts, the cost of unduly limiting Congress's ability to act in this area is to disable society from serving critical interests in the protection of children and privacy."¹¹² Anticipating the majority's application of strict scrutiny, the petitioner's brief argued that the Court should "afford deference to Congress's reasonable, predictive judgments that are particular, carefully tailored measures-such as Section 505- as the least restrict alternative that would achieve its ends." Conversely, the majority opinion argued that the Government had not met the strict scrutiny burden, and the "empirical evidence cited" by the S.G. did not persuade the Court that an alternative legislation (a hypothetical "Section 504" cited in the S.G.'s brief) would prove any less restrictive. The Court explained that "if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."

In a second repudiation of the S.G., the Court refused to address the United States' second question: "Whether the District Court was divested of jurisdiction to consider the Government's postjudgment motions after the Government filed a notice of appeal in [the Supreme] Court." In a complicated procedural argument, the S.G. posited that the *Supreme Court Rules* "leave uncertain the question whether such motions toll the time for appealing." Arguing that, if the District Court had allowed "postjudgment

¹¹² Solicitor General's petitioner's brief, *United States v. Playboy Entertainment*, << <http://www.usdoj.gov/osg/briefs/1999/3mer/2mer/98-1682.mer.aa.html>>>.

relief,” to rule on the S.G.’s motions “to alter, or amend, and to correct, the judgment,” the Supreme Court docket would have been eased of the burden caused by *Playboy*.

One of Waxman’s most famous cases of the 1999 Term was *United States v. Morrison*.¹¹³ Virginia Tech student Christine Brzonkala alleged that she was raped by two members of the varsity football team and filed a complaint under Virginia Tech’s Sexual Assault Policy. After an internal university hearing, one of the alleged offenders was “acquitted” and the other football player received a two-year suspension from the school as punishment. Soon however, the two-year suspension was set aside as being “too excessive,” allowing the second alleged rapist to play in the first game of the football season. Brzonkala dropped out of Virginia Tech and subsequently sued her two alleged offenders (respondents Morrison and Crawford) and Virginia Tech. At the U.S. District Court, Brzonkala argued that the attack violated the federal Violence Against Women Act (VAWA).¹¹⁴ The law provided victims of gender-motivated violence federal civil remedy. Morrison and Crawford moved to dismiss the suit, claiming the VAMA remedy was unconstitutional. The question presented to the Court in *Morrison* was: “Does Congress have the authority to enact the Violence Against Women Act of 1994 under either the Commerce Clause or Fourteenth Amendment?” The Court issued another 5-4 opinion delivered by Chief Justice Rehnquist, reasoning that Congress lacked authority under the Commerce Clause or the Fourteenth Amendment to pass the VAMA because the statute did not regulate an interstate commerce activity or redress harm caused by the state. Rehnquist wrote that, if Brzonkala’s allegations were true, relief must be issued by Virginia and not by the United States.

¹¹³ 529 U.S. 598 (2000).

¹¹⁴ 42 U.S.C Section 13981.

Although the majority agreed that the alleged act, as well as boastful comments made by Morrison and Crawford, “cannot fail to shock and offend,” the Court insisted it was not deciding a criminal case, rather a controversy over federalism.¹¹⁵ The majority asserted that the Violence Against Women Act represented an action outside the bounds of authority for the legislative branch. The Court explained that, although in Commerce Clause cases since *NLRB v. Laughlin Steel Corporation*,¹¹⁶ the power of Congress to regulate interstate commerce had increased, *United States v. Lopez*¹¹⁷ emphasized that, despite “[the] modern, expansive interpretation of the Commerce Clause, Congress’s regulatory authority is not without effective boundaries.” Rehnquist pointed to three broad categories in which Congress may regulate under the Commerce Clause. The Solicitor General did not contend that the authority for the Violence Against Women Act derived from the first two (“Congress may regulate the use of the channels of interstate commerce,” established in, among others, *Heart of Atlanta Motel, Inc. v. United States*¹¹⁸ or “Congress is empowered to regulate and protect the instrumentality of interstate commerce, or persons or things in interrelated commerce, even though the threat may come only from intrastate activities,” established in the *Shreveport Rate Cases*¹¹⁹).

The third circumstance in which Congress has the authority to regulate under the authority of the Commerce Clause derives from “those activities [which have] relation to interstate commerce,” a precedent established in *NLRB v. Jones & Laughlin Steel*

¹¹⁵ Supreme Court majority opinion, *United States v. Morrison*, <<<http://supct.law.cornell.edu/supct/html/99-5.ZO.html>>>.

¹¹⁶ 301 U.S. 1 (1937).

¹¹⁷ 514 U.S. 568 (1995).

¹¹⁸ 379 U.S. 241 (1964).

¹¹⁹ *Houston, East & West Railroad Company. v. United States*, 234 U.S. 342 (1914).

Corporation.¹²⁰ This final circumstance governing congressional authority formed the foundation of the Solicitor General's argument.¹²¹ The majority opinion held that "the petitioners ... downplay the role that the economic nature of the regulated activity plays in [the Court's] Commerce Clause analysis." Although Waxman presented empirical data finding that violence against women has effects on commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with businesses....," the majority dismissed that these findings as irrelevant if the enumeration of Congress's powers was maintained.

The Court also rejected the Solicitor General's argument that VAWA should be upheld as an exercise of Congress's remedial power under Section 5 of the Fourteenth Amendment. Although the majority conceded that petitioners presented volumes of evidence that indicated a potential bias by state courts in gender discrimination cases, it did not overcome the limitations created by the language and purpose of the Fourteenth Amendment. The Solicitor General argued that two recent decisions, *United States v. Guest*¹²² and *District of Columbia v. Carter*,¹²³ overruled the traditional limitations against congressional remedial authority over private persons and private conduct. However, Rehnquist sharply criticized the Solicitor General's argument as "simply not the way reasoned constitutional adjudication proceeds." The majority gave much more recognition to Justice Souter's dissent than the argument of the petitioners.¹²⁴

Waxman as Respondent

¹²⁰ 301 U.S. 1 (1937).

¹²¹ Solicitor General petitioners brief, *United States v. Morrison* <<<http://www.usdoj.gov/osg/briefs/1999/3mer/2mer/99-0005.mer.aa.html>>>.

¹²² 383 US 745 (1966).

¹²³ 409 US 418 (1973).

¹²⁴ Souter's disputes were discussed in four of the majority opinion's eight footnotes.

Ironically, the outcome of *Dickerson v. United States*¹²⁵ represents a more significant contribution to the common law separation of powers precedent than its theme of *Miranda* rights may initially suggest. Disputes over the timing of his post-arrest confession prompted petitioner Charles Dickerson to file a motion to suppress the statement in trial, claiming he was not advised of his *Miranda* rights until after making his incriminating account. The District Attorney for the Eastern District of Virginia argued that even if he had not received his *Miranda* rights, Dickerson's statement should be considered voluntary under 18 USC 3501¹²⁶ and thus admissible as evidence in trial. The Fourth Circuit Court of Appeals acknowledged Dickerson had not received his *Miranda* rights, but found that his confessions were not coerced and consequently were admissible under 3501. The question presented to the Court by *Dickerson* was: "May Congress legislatively overrule *Miranda v. Arizona* and its warnings that govern the admissibility of statements made during custodial interrogation?" In a 7-2 opinion, surprisingly written by Chief Justice Rehnquist, the majority adamantly denied that Congress had the authority to overrule a constitutional decision by the Supreme Court. The Court found that "Congress intended by its enactment to override *Miranda*."¹²⁷ Furthermore, Congressional authority may not extend to reverting the law to its pre-

¹²⁵ 530 U.S. 428 (2000).

¹²⁶ Under statute, 18 U.S.C. section 3501, the constitutionality of the interrogation (and the subsequent admissibility of any confession) depends instead on whether or not the suspect made the statements "voluntarily," as measured by the totality of the circumstances. Eric D. Miller, "Should Courts Consider 18 USC § 3501 Sua Sponte?" *University of Chicago Law Review*, <<<http://lawreview.uchicago.edu/issues/archive/v65/summer/miller.html>>>.

¹²⁷ Supreme Court majority opinion, *Dickerson v. United States*, <<<http://supct.law.cornell.edu/supct/html/99-5525.ZO.html>>>.

Miranda “totality-of-the-circumstances” precedent. Rehnquist wrote, that even if the Court was to reconsider *Miranda*, the “principles of *stare decisis* weigh heavily against overruling it.” The majority added that since its inception, *Miranda* has become entrenched in American culture and “law enforcement practices have adjusted to its strictures.”

The parallels between the Solicitor General’s response (with Seth Waxman again serving as counsel of record) and the majority opinion are striking. The development of argument in the majority opinion is almost an exact reflection of the S.G.’s response on the merits. The respondent’s brief absolutely refuted congressional authority to overturn *Miranda*, the intention of 3501. Waxman wrote that “*Miranda* and its progeny represent an exercise of [the] Court’s authority to implement and effectuate constitutional rights, and, accordingly, those decisions are binding on Congress.”¹²⁸ Thus, confessions currently protected by *Miranda* could only be permissible if the decision was overruled. *Stare decisis* and the established role “*Miranda* has come to play in the criminal justice system” dictate the decision should be upheld. Waxman, in a statement that is clearly reflected in the majority opinion, posited that “the principle of *stare decisis* does not favor the overruling of *Miranda*. *Miranda* provides clear guidance to law enforcement officers,” while the totality-of-the-circumstances test proved arduous for police and the judicial system in its application. While a return to the “totality” test may result in augmented admissibility of confessions, the S.G. argued that this potential outcome did not overrule its threat to public trust in the criminal justice system or the resulting instability of Supreme Court criminal jurisprudence if *Miranda* was, in effect, overturned.

¹²⁸ Solicitor General’s respondents brief, *Dickerson v. United States*,
<<<http://www.usdoj.gov/osg/briefs/1999/3mer/2mer/99-5525.mer.rep.html>>>.

It would be redundant to summarize the development of the argument in the majority opinion because it mirrors the preceding description of the Solicitor General's brief on the merits. Instead, the subsequent direct quotations and references serve as evidence of the government's high degree of influence in his role as respondent in *Dickerson*. Proving that *Miranda* rules are rooted in the Court's authority to interpret and apply the Constitution, both the majority opinion and the Solicitor General's brief cite the same quotation from the 1966 *Miranda* opinion; in which the Court granted *certiorari* "to explore some facets of the problems...of applying the privilege against self-incrimination to in-custody of interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow."¹²⁹ The use and context of this quotation (even the editorial ellipses) are exact in both majority opinion and the Solicitor General's brief.

To establish that Congress intended to return the law to the pre-*Miranda* "voluntariness test" by passing Section 3501 only two years after the *Miranda* decision, both S.G.'s brief and Court majority opinion cite *Brown v. Mississippi*.¹³⁰ Both documents explain, in extremely similar language, that *Brown v. Mississippi* was the "Court's first reversal of a criminal conviction because it was based on a confession obtained by force"¹³¹ The S.G. respondent's brief and the Court's majority opinion dispute that *Miranda* was intended as merely "supervisory rules of procedure and

¹²⁹ 382 U.S.441 (1965).

¹³⁰ 297 U.S. 278 (1936).

¹³¹ To demonstrate the strikingly similar language used by the Solicitor General, the respondent's brief writes that the "Court first reversed a criminal conviction on the ground that it was based on a concession that was obtained by physical force."

evidence,” as argued by petitioners. The consistent application of *Miranda* in the states demonstrated that the decision is constitutionally based.

The preceding examples are not coincidental uses of legal jargon or anecdotal similarities in litigation. Dozens of similar parallels between the arguments used by the Solicitor General and the majority opinion used in *Dickerson v. United States* could be cited as evidence that the S.G.’s reasoning had a clear influence, not only over decision-making, but the composition of the majority opinion. The same conclusion, supported by a similar development of argument and punctuated by many of the exact same quotations from case law, indicate the Court’s high regard for legal reasoning of the Solicitor General as respondent.

October Term 2001-2002: High-Profile Cases

Theodore Olson as Solicitor General

Olson as *Amicus Curiae*

At issue in *Zelman v. Simmons-Harris*,¹³² dubbed “the school vouchers case” by the mainstream media, was Ohio’s “Pilot Project Scholarship Program” which provided tuition assistance in the form of vouchers for low-income students in the Cleveland City School District. The children’s parents were free to choose from participating public or private schools, which included both religious and secular institutions, but 96% chose Catholic schools. Tuition aid was distributed to parents according to financial need, and sixty percent of the students receiving government aid came from families below the poverty line. A group of taxpayers (respondents *Simmons-Harris, et. al.*) challenged the Ohio program on the grounds that it violated the First Amendment Establishment Clause. The Federal District Court granted the taxpayers summary judgment that the Court of Appeals for the Sixth Circuit affirmed. The question presented to the Supreme Court in *Zelman* was “Does Ohio’s school voucher program violate the Establishment Clause?” Chief Justice Rehnquist delivered the 5-4 majority opinion of the Court, which held that the Pilot Project Scholarship Program did *not* violate the Establishment Clause because it fulfilled part of the state’s general goal to provide educational opportunities to children. Furthermore, the government aid would only reach religious schools by independent parental choice. Finally, the Court concluded that the program was neutral in the appropriation of aid and any advancement or endorsement of religion was incidental and

¹³² 536 U.S. 639 (2002).

not attributable to the government. In conclusion, the Court upheld the constitutionality of the Pilot Project Scholarship Program as a program of legitimate private choice and consistent with the First Amendment.¹³³

In one of his first cases as Solicitor General, Theodore Olson argued in favor of the Ohio school voucher program and against the U.S. Court of Appeals decision that held the program violated the Establishment Clause. Arguing that the United States had “a strong interest in ensuring that States and local governments are afforded the flexibility that the Constitution reserves to them to provide ... education [for]the nation’s youth,” the S.G. filed his *amicus* brief in support of petitioners. Olson asserted that Ohio enacted the program so the impoverished children of Cleveland could “avoid the debilitating, life-long consequences of a failed education.” In his *amicus* brief, the S.G. reasoned that the Ohio program’s primary aim was the secular goal of promoting education. The majority opinion agreed with the S.G., and the language between the majority opinion and the *amicus* brief was markedly similar. For example, using the exact same language, as in the Solicitor General *amicus*, Rehnquist asserted that the central controversy of the case was “whether the Ohio program, nonetheless has the forbidden effect of advancing religion” and not an attempt by the government to establish a religion.¹³⁴

Both the S.G. *amicus* brief and the majority opinion opened by denying that the Ohio program violated the First Amendment Establishment Clause and fulfilled criteria

¹³³ Supreme Court majority opinion, *Zelman v. Simmons-Harris*, <<<http://supct.law.cornell.edu/supct/html/00-1751.ZO.html>>>.

¹³⁴ The only difference between the two documents on this point is quotations placed around “effect” in the majority opinion.

established by *Agostini v. Felton*.¹³⁵ Because Ohio was not recruiting recipients in reference to religion or indoctrinating a particular religion, both documents deny that “the government acted with the purpose of advancing or inhibiting religion.”¹³⁶ The S.G. found the Ohio program satisfactorily passed the two-prong test established in *Agostini*. Rehnquist agreed, and explained that any indoctrination that may have occurred in religious schools was “not reasonably attributable to government action.” Interestingly, Rehnquist cited *Mitchell v. Helms*,¹³⁷ a case from the Court’s 1999 Term in which former- Solicitor General Seth Waxman (acting as petitioner) received a favorable ruling from the Court.

Citing numerous precedents,¹³⁸ Olson argued that the Court had repeatedly upheld tuition assistance programs if the choice of school was independent and private. He declared that the “Ohio pilot scholarship program fits comfortably within the framework [established and affirmed by the Court] ... Parental choice, not government indoctrination, was the hallmark of the [program].”¹³⁹ Finally, Olson disputed the basis of the petitioner’s argument, that the precedent established in *Committee for Public Education and Religious Liberty v. Nyquist*¹⁴⁰ was relevant to the Ohio program. The program in question in *Nyquist* was created with the intention of assisting students statewide and gave assistance to parents to keep their children in public schools.

¹³⁵ 521 U.S. 203 (1997).

¹³⁶ Principles developed by *Agostini*, 521 U.S. 203, 221-223 (1997), as cited by Solicitor General’s amicus brief.

¹³⁷ 530 U.S. 793 (2000).

¹³⁸ *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986).

¹³⁹ Solicitor General amicus brief, *Zelman v. Simmons-Harris*, <<<http://www.usdoj.gov/osg/briefs/2001/3mer/1ami/2000-1751.mer.ami.html>>>.

¹⁴⁰ 413 U.S. 756 (1973).

Additionally, Olson reasoned that *Nyquist* must be read in light of the “significant constitutional changes,” which the Court has produced since 1973, particularly *Agostini*. Favoring the S.G.’s argument, Rehnquist rejected the petitioners’ suggestion to apply *Nyquist* in *Zelman*. In the majority opinion, he articulated the same two reasons for rejecting this case as did the S.G. *amicus* brief. Rehnquist dismissed the comparison to *Nyquist* because: “first, the program was quite different from the program challenged [in *Zelman*]. Second, were there any doubt that the program challenged in *Nyquist* is far removed ... [the Court] expressly reserved judgment with respect to ‘a case involving some form of public assistance made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.’” Finally, Rehnquist concluded that the Ohio program was constitutional because it is entirely neutral to religion, provides benefits to a wide spectrum of individuals and permits genuine choice. In the interest of *stare decisis*, the Court maintained “an unbroken line of decisions rejecting challenges to similar programs” and held the Ohio program does not violate the Establishment Clause by a 5-4 vote.

*McKune v. Lile*¹⁴¹ represents another of the Court’s most high-profile cases of the October 2001 term. Robert Lile, a convicted rapist, was ordered by prison officials to complete Kansas’s Sexual Abuse Treatment Program (SATP). The program required that inmates complete and sign an “Admission of Responsibility” form, in which they assume accountability for the crime they were convicted, and a sexual history detailing prior sexual experiences, regardless of the legality of the activities. The information obtained from SATP is not confidential and, if an inmate does not participate in the program, his

¹⁴¹ 536 US 24 (2002).

privileges are reduced. Respondent Lile refused to complete the SATP, arguing that the criminal disclosure requirement violated his Fifth Amendment right against self-incrimination. The U.S. District and Court of Appeals for the Tenth Circuit ruled in favor of Lile. The question presented to the Justices in *McKune v. Lile* was: “Does the Kansas Sexual Abuse Treatment Program violate inmates’ Fifth Amendment privilege against compelled self-incrimination?” Justice Kennedy delivered the Court’s 6-3 plurality opinion reversing the District and the Court of Appeals’ judgments.

Solicitor General Olson conceded that the privilege against self-incrimination protected by the Fifth Amendment did not terminate upon incarceration. However, incarceration and the resulting restriction on “an inmate’s liberty clearly inform the Fifth Amendment analysis.” Olson indicated that the precedent established in *Sandin v. Conner*¹⁴² holds that revoking privileges or changes in incarceration status does not violate constitutional protections of liberty. In short, prisoners are not entitled to privileges.

Additionally, the S.G. argued that even if the SATP implicates Fifth Amendment protections, “it does not violate the Constitution because any burdens on those rights are reasonably related to legitimate penological interests,”¹⁴³ a significant constitutional concern as established in *Turner v. Safley*.¹⁴⁴ Olson argued that Kansas’s interest in reducing sexual offender recidivism was justifiable, and that “the treatment program advances that interest” exclusively. Olson continued to urge that restrictions on the confidentiality of the prisoners’ reports also promote penological objectives, as

¹⁴² 515 U.S. 472 (1995).

¹⁴³ Solicitor General *amicus* brief, *McKune v. Lile*

<<<http://www.usdoj.gov/osg/briefs/2001/3mer/1ami/2000-1187.mer.ami.html>>>.

¹⁴⁴ 482 U.S. 78 (1987).

counselors are required to recount information concerning child or other inmate abuse to prison officials.

The majority opinion and the S.G. *amicus* brief stressed the serious threat that sex offenders pose to the country. Both documents cited the same figures from a Department of Justice Report,¹⁴⁵ indicating that the recidivism rate for sex offenders is higher than any other type of crime. Offenders who do not receive treatment have a recidivism rate as high as eighty percent. The Court concluded (in agreement with the Solicitor General's *amicus* brief) that the SATP serves a legitimate penological interest. Justice Kennedy wrote that clinical rehabilitation programs "can enable sex offenders to manage their impulses" and reduce the threat of repeat offenses to the nation.¹⁴⁶

Both the S.G. and the majority opinion asserted that a violation of the Fifth Amendment requires an individual to be compelled to incriminate himself, as established in *United States v. Monia*.¹⁴⁷ The two documents reasoned that the SATP program does not represent an unconstitutional compulsion of prisoners to provide self-incriminating evidence. The reduction of privileges (loss of television or access to the gym) does not constitute a violation of the Due Process Clause. Olson demonstrated that *Sandin* held that challenged prison conditions are only a violation if they give rise to "atypical and significant hardships[s] on [inmates] in relation to the ordinary incident of prison life." In a critique of the opposing counsel, the Court held that the respondent's treatment of the federal program was not "confined in any meaningful way, and state and federal courts

¹⁴⁵ The Department of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders (1997) found that nearly 355,000 rapes occurred in the United States in 1995.

¹⁴⁶ Supreme Court majority opinion, *McKune v. Lile*, <<<http://supct.law.cornell.edu/supct/html/00-1187.ZO.html>>>.

¹⁴⁷ 317 U.S. 424 (1943).

applying that view would have no principled means to determine whether these similarities are sufficient to render the federal program unconstitutional.”

The majority opinion highlighted the Solicitor General’s *amicus* brief in describing the federal government’s sex offender treatment program. The Court dedicated an entire paragraph to approving the S.G.’s argument that, even if the Kansas program was deemed unconstitutional, the federal sex offender program should be held consistent with the Fifth Amendment. Even though the argument was moot in light of the Court’s reversal of the Court of Appeals decision, the majority agrees that the intent of the federal program is similar to Kansas’s SATP.

Not only has the Court affirmed his conclusion and followed the same line of argument as the Solicitor General, but the majority even referenced the S.G.’s effort to advise the Court of the decision’s potential effect on federal programs. This controversy was not a question presented in *McKune v. Lile*, and the attention given to the S.G.’s comparison to federal programs by the majority opinion is remarkable. Finally, the Court concluded that the SATP is a sensible approach in reducing recidivism, serves a legitimate penological interest and allows prison administrators to issue incentives to participants in treatment programs.

Solicitor General Olson again served as an *amicus* in *Board of Education of Independent School District Number 92 of Pottawatomie County v. Earl*.¹⁴⁸ The Student Activities Drug Testing Policy of the Tecumseh, Oklahoma, School District required all middle and high school students to consent to a drug test before participating in any extracurricular activity. Alleging that the policy violated the Fourth Amendment

¹⁴⁸ 536 U.S. 822 (2002).

protection against unreasonable search and seizures, two students and their parents brought suit against the Pottawatomie County school system. The question presented in this case was: “Is the Student Activities Drug Testing Policy, which requires all students who participate in competitive extracurricular activities to submit to drug testing, consistent with the Fourth Amendment?” In a 5-4 opinion delivered by Justice Thomas, the Court upheld the school policy as consistent with the Constitution in serving an important interest of the School District to detect and prevent student drug use.

The Solicitor General’s *amicus* brief argued that the policy in Tecumseh schools satisfied the Fourth Amendment under the same considerations the Court used in upholding random drug-testing in *Vernonia School District v. Acton*,¹⁴⁹ Arguing that the “privacy interests” were identical to those in *Vernonia*, the most significant consideration identified that “the policy was adopted by a school district fulfilling its guardianship responsibilities to its students”-- is just as relevant in *Earls*.¹⁵⁰ Students who participate in extracurricular activities are subject to extra academic and conduct requirements. Olson argued that the intrusion by the Tecumseh schools was even less severe than was alleged in *Vernonia*. Students at the Tecumseh schools were permitted to provide the specimens from behind “closed stalls,” and the information concerning prescription medication remained confidential. Olson pointed out that even in the more intrusive circumstances of *Vernonia*, the Court characterized the imposition as “negligible.” The S.G.’s *amicus* argued that the Tenth Circuit Court of Appeals’ adverse decision against petitioners erred in its conclusion that the government did not have an immediate concern in mandating

¹⁴⁹ 515 U.S. 646 (1995).

¹⁵⁰ Solicitor General *amicus* brief, *Board of Education v. Earls*,
<<<http://www.usdoj.gov/osg/briefs/2001/3mer/1ami/2001-0332.mer.ami.html>>>.

the tests for students involved in extracurricular activities. Olson declared that the demonstrated problem of drug use in the Tecumseh schools was very similar to the preponderance of drug use in *Vernonia*. The S.G. urged the Court to uphold the drug testing policy as reasonable and “leave school administrators with flexibility to adopt common-sense, drug-deterrence measures like the policy at issue” in *Earls*.

The majority affirmed not only the Solicitor General’s conclusion, but also every argument made in favor of the Oklahoma school drug-testing program offered in his *amicus* brief. The majority found that although the facts of the *Vernonia* case were slightly different, when its principles were applied to *Earls*, the program was constitutional. Additionally, Rehnquist wrote in a 5-4 opinion that the School District has an important interest in preventing drug use and its drug-testing policy did not violate the Fourth Amendment. The level of intrusion imposed by the sample collection and use of test results were not unreasonable. The Court affirmed that the policy effectively serves the government’s concern in protecting children’s safety and preventing illicit drug use.¹⁵¹

The heinous crime and alleged negligence by the defense attorney in *Bell v. Cone*¹⁵² attracted significant media attention in 2001. Arrested after a two-day violent crime spree that ended with the murder of an elderly couple, Gary Cone was tried and convicted in a Tennessee court despite his lawyer’s application of the insanity defense. During sentencing, Cone’s lawyer called no witnesses and waived the opportunity to defend his client in closing arguments. Cone was sentenced to death. His post-conviction

¹⁵¹ Supreme Court majority opinion, *Board of Education v. Earls*,
<<<http://supct.law.cornell.edu/supct/html/01-332.ZO.html>>>.

¹⁵² 243 F.3d 961 (1996).

petition for relief, asserting that counsel was ineffective during the sentencing phase of his trial, was denied by the State Criminal Court. Subsequently, the Federal District Court denied Cone's *habeas* petition. The Court of Appeals for the Sixth Circuit reversed, holding that Cone's Sixth Amendment rights were violated because his lawyer, by not issuing a closing argument, did not subject the state's death penalty to the required adversarial test. The question presented in *Bell v. Cone* was: "Does defense counsel render ineffective assistance during the sentencing phase of a murder trial by failing to present mitigating evidence and waiving final argument?" An 8-1 plurality opinion delivered by Chief Justice Rehnquist concluded that the Court of Appeals erred in its decision, and counsel's representation of Cone was not contrary to federal law.

The Solicitor General's *amicus curiae* brief recalled the Court's most relevant precedent of *Strickland v. Washington*,¹⁵³ which created a two-part test governing all claims of ineffective counsel.¹⁵⁴ The defendant must "first show that 'counsel's representation fell below an objective standard of reasonableness'¹⁵⁵ ... and second ... [he] must show that 'the deficient performance prejudiced the defense.'"¹⁵⁶ The S.G. argued that the Court of Appeals for the Sixth Circuit inappropriately related *Bell v. Cone* to *United States v. Cronin*.¹⁵⁷ He stated that applying the criteria of *Cronin* in *Bell v. Cone* had the undesirable effect of "swallowing the rule in *Strickland*." Furthermore, the S.G. predicted that applying *Cronin* would "undermine society's interest in the finality of conviction without serving any countervailing Sixth Amendment values." Finally, Olson

¹⁵³ 466 U.S. 668 (1984).

¹⁵⁴ Solicitor General *amicus* brief, *Bell v. Cone*,
<<http://www.usdoj.gov/osg/briefs/2001/3mer/1ami/2001-0400.mer.ami.html>>.

¹⁵⁵ *Ibid*, 688.

¹⁵⁶ *Ibid*, 687.

¹⁵⁷ 466 U.S. 648 (1984).

asserted that to the contrary of respondent's arguments, Cone's counsel "actively participate and assisted [him] at sentencing."

Affirming the S.G.'s arguments, Rehnquist concluded that the principles announced in *Strickland* (and not *Cronic*) were the most appropriate governing the analysis of Cone's claim. Rehnquist reasoned that "respondent's counsel was faced with the formidable task of defending a client who had committed a horribly brutal and senseless crime against two elderly persons in their home."¹⁵⁸ In conclusion, Rehnquist reasoned that respondent cannot obtain relief because the state court had used an reasonable application of *Strickland*.

Olson also filed an *amicus* brief in 2001's *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.¹⁵⁹ In 1981, the Tahoe Regional Planning Agency (TRPA) imposed two moratoria totaling thirty-two months on development on Lake Tahoe while devising a land-use plan for the area. Real estate owners affected by the moratoria, represented by Tahoe Sierra Preservation Council, filed suit claiming that TRPA's actions constituted an illegal seizure of their land without compensation. The District court found that the moratoria constituted a categorical taking because TRPA temporarily deprived owners from utilizing the economic value of their property. The Court of Appeals for the Ninth Circuit reversed, holding that the regulations only had a temporary effect and no thus no categorical taking occurred. The question presented to the Court was: "Does a moratorium on development imposed during the process of devising comprehensive land-use plans constitute a *per se* taking of property requiring

¹⁵⁸ Supreme Court majority opinion, *Bell v. Cone*,
<<<http://supct.law.cornell.edu/supct/html/01-400.ZO.html>>>.

¹⁵⁹ 122 S. Ct. 1465 (2002).

compensation under the Fifth Amendment's Takings Clause?" Justice Stevens delivered the 6-3 plurality opinion of the Court, which affirmed the Ninth Circuit's holding that the TRPA moratoria did *not* constitute an unconstitutional taking of the landowner's property.

Solicitor General Ted Olson argued that temporary regulations on land use are "highly unlikely to eliminate the value of real property"¹⁶⁰ and thus do not pose a burden on landowners and do not violate the Just Compensation Clause of the Fifth Amendment. The S.G. continued to argue that "even without announcing a formal development moratorium, the permitting agency could consider overall patterns of actual or anticipated development on individual permit applications." Thus, a formal and public moratorium "simply increases the transparency of the land-management process." Olson cited *First English Evangelical Lutheran Church v. County of Los Angeles*,¹⁶¹ as precedent against petitioner's claim of a *per se* taking of the real-estate owner's land.

While the majority opinion did not explicitly cite the Solicitor General's arguments, the Court decided in accordance with the reasoning espoused in the government's *amicus* brief. The influence of the Solicitor General is clear in the majority's reasoning that the *First English* forms the framework to decide *Tahoe-Sierra* and not *Lucas v. South Carolina Coastal Council*.¹⁶² Following similar reasoning as the S.G., the Court emphasized the temporary nature of the moratoria. Additionally, the Court cites *Pennsylvania Coal Company v. Mahon*,¹⁶³ as establishing that "a physical

¹⁶⁰ Solicitor General *amicus* brief, *Tahoe-Sierra v. Tahoe Regional Planning Agency*, << <http://www.usdoj.gov/osg/briefs/2001/3mer/1ami/2000-1167.mer.ami.html>>>.

¹⁶¹ 482 U.S. 304 (1987).

¹⁶² 505 U.S. 1003 (1992).

¹⁶³ 260 U.S. 393 (1992).

appropriation nor a public use has ever been a necessary component of a 'regulatory taking.'"¹⁶⁴

Olson as Petitioner

Representing Attorney General John Ashcroft, Solicitor General Olson filed a petition challenging an adverse ruling to federal legislation in Court of Appeals for the Ninth Circuit. Respondents, the Free Speech Coalition, are a trade association representing the adult film industry. They filed suit in the District Court against the Child Pornography Prevent Act of 1996 (CPPA), claiming the law's restrictions are unconstitutionally vague and prohibit the First Amendment's protection of free speech. The CPPA prohibited any photography or film of, or the appearance of, a minor engaging in sexually explicit conduct. The question presented to the Court in *Ashcroft v. Free Speech Coalition*¹⁶⁵ was: "Does the Child Pornography Prevention Act of 1996 abridge freedom of speech where it proscribes a significant universe of speech that is neither obscene under *Miller v. California* nor child pornography under *New York v. Ferber*?" In a 6-3 opinion written by Justice Kennedy, the Court upheld the ruling of the Court of Appeals, finding the CPPA unconstitutional. Because not all material prohibited by the CPPA was considered obscene under the *Miller* test, and the law has no support in the *Ferber* decision, the Court based its opinion against CPPA as the legislation had the potential to prohibit otherwise legal activities.

¹⁶⁴ Supreme Court majority opinion, *Tahoe-Sierra v. Tahoe Regional Planning Agency*, <<<http://supct.law.cornell.edu/supct/html/00-1167.ZO.html>>>.

¹⁶⁵ 198 F.3d 1083 (1999).

In a striking departure from previous cases of the 2001 term and the 1999 term, the Court not only rejected the Solicitor General's argument, but each point critiqued it at length. In fact, the vast majority of the opinion was dedicated to tackling the government argument. The Solicitor General's briefs were quoted and analyzed explicitly. Under the rationale of the CPPA, "harm flows from the content of the images, not from the means of their production."¹⁶⁶

Kennedy wrote that "the flaw in the Government's position is that *Ferber* did not hold that child pornography is by definition without value." The Court cited *Romeo and Juliet* and the Oscar-nominated film *Traffic* as containing the appearance of sexual activity between minors, but serving a legitimate interest to society. "The Government seeks to justify its prohibitions in other ways. It argues that the CPPA is necessary because pedophiles may use virtual child pornography to seduce children." In rebuking this S.G.'s argument, the Court cited *Butler v. Michigan*¹⁶⁷, in which a unanimous Court agreed upon the important First Amendment principle that the State could not "reduce the adult population ... to reading only what is fit for children... The Government cannot ban speech fit for adults simply because it may fall into the hands of children." The Court refuted the S.G.'s reasoning that virtual child pornography "whets the appetites of pedophiles and encourages them to engage in illegal conduct." Kennedy wrote that the government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts," a precedent established in *Stanley v. Georgia*.¹⁶⁸

¹⁶⁶ Supreme Court majority opinion, *Ashcroft v. Free Speech Coalition*, <<<http://supct.law.cornell.edu/supct/html/00-795.ZO.html>>>.

¹⁶⁷ 352 US 380 (1957).

¹⁶⁸ 394 U.S. 557 (1969).

The majority opinion reasoned that “the Government next argues that its objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well. Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged.” The Court referred to this argument as “somewhat implausible,” reasoning that pornographers would not risk prosecution by abusing real children if computer images would suffice to attract clients. Finally, the S.G. asserted that the possibility of producing images by using computer imaging makes it very difficult to prosecute those who produce pornography using real children.¹⁶⁹ In a strong critique of the S.G.’s argument, the Court asserted that “[his] analysis turns the First Amendment upside down.”

*United States v. Drayton*¹⁷⁰ represents another high-profile case of the 2001 Term in which the S.G. served as petitioner. Respondents Christopher Drayton and Clifton Brown were traveling on a Greyhound bus when, in Tallahassee, Florida, police officers boarded as part of a routine interdiction. One police officer approached Drayton and Brown and, without informing them of their right to refuse to cooperate, asked to inspect the bags and person of both respondents. Both men were arrested when bags of cocaine were found taped to their thighs. Charged with federal drug possession, respondents moved to suppress the drug evidence on the grounds that their consent to the searches was invalid. The U.S. District Court found the behavior of the police officers not coercive, while the Court of Appeals reversed. The question presented in *United States v.*

¹⁶⁹ Solicitor General petitioner’s brief, *Ashcroft v. Free Speech Coalition*, << <http://www.usdoj.gov/osg/briefs/2001/3mer/2mer/2000-0795.mer.rep.html>>>.

¹⁷⁰ 536 US 194 (2002).

Drayton was: “Must police officers, while searching buses at random to ask questions and to request passengers’ consent to searches, advise passengers of their right not to cooperate?” A 6-3 opinion delivered by Justice Kennedy held that the Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and refuse consent.

Justice Kennedy composed a concise, pithy opinion of only twelve pages. He argued that the mere act of stopping and posing questions to those willing to listen by police officers does not constitute a violation of the Fourth Amendment. He indicated that the Court had already addressed the issued of drug interdiction on buses in *Florida v. Bostick*.¹⁷¹ “...*Bostick* made it clear that, for the most part, *per se* rules are inappropriate in the Fourth Amendment context.” Kennedy discounted the respondents’ contentions that the officers’ display of badges and physical presence constituted coercion.

The Solicitor General’s brief on the merits was similarly and uncharacteristic short (containing a mere six footnotes). Articulating Kennedy’s argument in the majority opinion, the S.G. emphasized the police officers’ calm questioning of the two men, remarking that Officer Lane spoke to the passengers “politely in a quiet voice, did not show a weapon or make intimidating movements.”¹⁷² The S.G. stated that to deem the officers’ behavior as coercive and in violation of the Fourth Amendment represented a “conclusion [that] cannot be reconciled with this Court’s case.” Emphasizing the two main precedents, The Court dedicated its argument in the majority opinion to two main

¹⁷¹ 501 U.S. 434 (1991).

¹⁷² Solicitor General petitioners brief, *United States v. Drayton*,
<< <http://www.usdoj.gov/osg/briefs/2001/3mer/2mer/2000-0795.mer.rep.html>>>.

precedents: *Bostick* and *Florida v. Rodriguez*,¹⁷³. Seizure determinations must be made in light of the "totality of the circumstances."

Olson as Respondent

Despite complicated facts, *Utah v. Evans* (with the S.G. representing Secretary of Commerce Donald Evans) won significant public attention in the 2001 term. The Census Bureau used "hot-deck imputation"¹⁷⁴ to fill in information gaps in the 2000 census. The hot-deck imputation method increased North Carolina and Utah's population by .4% and by .2% respectively. Consequently, North Carolina won one more representative in Congress and Utah lost one more seat than if the Bureau had counted the information gaps as zero. Utah filed suit against the Census Bureau claiming that hot-deck imputation violated 13 USC Section 195, prohibiting "the statistical method known as sampling," and Article I, Section 2, Clause 3 of the Constitution stating, "an actual Enumeration be made." Utah sought an injunction to change the official census results. On direct appeal from the United States District Court for the District of Utah, the questions presented in *Utah v. Evans* were: "Does the Census Bureau's use of 'hot-deck imputation,' in the 2000 census, violate the statutory provision forbidding use of the statistical method known as sampling? Is this methodology inconsistent with the Constitution's statement that an "actual Enumeration be made?" In a 5-4 opinion,

¹⁷³ 469 US 1 (1984).

¹⁷⁴ Hot-deck imputation is a complicated statistical method in which data missing from a study (in *Utah v. Evans*, the 2000 Census) is assumed to be random. The values assigned to the absent information come from other observable variables from the study. Michael Davernon, et.al, "Missing the Mark? Possible Imputation Bias in the Current Population Survey's State Income and Health Insurance Estimates." Presentation to the University of Minnesota: School of Public Health. 9 May 2002, <<<http://www.shadac.umn.edu/publications/presentations/.ppt>>>.

delivered by Justice Breyer, the majority of the Court held that the use of hot-deck imputation violated neither the statute nor the Constitution.

The Solicitor General began his respondent's brief arguing that the "well-accepted definition"¹⁷⁵ of sample by statisticians is different from the method of imputation. In sampling, a deliberate subset of the population is extracted and assumed to be representative of the whole population. Alternatively, the S.G. explained that "imputation...is a method of processing data that have already been collected." He disputed that the "Census Clause" of the Constitution prescribes a particular method of determining the population, by reasoning that "the words 'actual Enumeration' simply refers to the concrete undertaking of ascertaining the population of the States."

The majority opinion lauded the S.G.'s reasoning, and agreed that the process and outcome of imputation are distinct from the sampling method. Additionally, Breyer borrowed the S.G.'s use of "a simplified example to help explain [the statistical method of imputation...involving] a librarian who wishes to determine the total number of books in a library."¹⁷⁶ Obviously, the Court was perplexed by hot-deck imputation and acknowledged the S.G.'s talent in explaining the complex statistical method. The Solicitor General argued that the goal of hot-deck imputation provided "information on a portion of a population 'by inferring' information on the population as a whole." The S.G. continued to demonstrate how imputation differs from sampling in respect to the nature of the enterprise, the methodology used, and the immediate objective sought. The Court exhibited impressive deference to the S.G.'s argument by borrowing its inventive

¹⁷⁵ Solicitor General respondent's brief, *Utah v. Evans*,
 <<<http://www.usdoj.gov/osg/briefs/2001/3mer/2mer/2001-0714.mer.aa.html>>>.

¹⁷⁶ Supreme Court majority opinion, *Utah v. Evans*,
 <<<http://supct.law.cornell.edu/supct/html/01-714.ZO.html>>>.

analogy not only to describe hot-deck imputation, but its consistency with the Constitution.

Conclusion

Procedural Level Results

Upon its creation in 1870, the Office of Solicitor General was assigned the responsibility of aiding the Attorney General in preparing the federal government's litigation, a position with minimal influence over the Supreme Court. In the nearly 135 years since its establishment, the Solicitor General has developed a more prominent role in the Department of Justice. In addition to his primary duty of overseeing and conducting government litigation at the Supreme Court, the S.G. must satisfy implicit responsibilities to all three branches of government. In short, the role of the S.G. has evolved from assistant to the Attorney General to the "Tenth Justice."

The Solicitor General's success is renowned by the national media and unparalleled among external actors at the Supreme Court. Without fulfilling the Court's unspoken demand for high-quality legal analysis, the S.G. would not have attained his unrivaled respect among the Justices. To fully examine the influence of the S.G. over the Supreme Court, research must utilize a multi-pronged methodology to account for the office's political and legal obligations. Most research on the Solicitor General focuses on his "winningness," or success in attaining favorable decisions by the Supreme Court. As majority opinions represent the highest legal authority in the United States, studying influence over decision-making is vital, although not a thorough investigation of the impact of the S.G. My research supplements the existing body of literature on the influence of the Solicitor General by offering an examination of his impact on decisions at the procedural stage of Court litigation. To account and analyze for the S.G.'s various

roles and responsibilities, my research combines quantitative and qualitative analysis of advocacy at the petition and merits stages of Supreme Court practice.

Although prior research on the S.G.'s procedural litigation is limited, my results contrast with the conclusions of existing literature on case-selection, involvement, CVSGs, etc. Contrary to the findings of previous research, my findings indicate that the Solicitor General's procedural-level success does not depend on the incumbent party. Several procedural-level tests, (acceptance rate of S.G. petitions, CVSGs briefs, and uninvited *amicus* briefs), do not reveal a significant difference between the success or involvement of a Democratic- or Republican-appointed S.G. The influence of the Office of Solicitor General over the Supreme Court should be viewed as a consistent and constant source of legal expertise not dependent on the ideology or party-affiliation of the appointing administration.

Though the presence of the S.G. is almost ubiquitous at the Supreme Court, his procedural level advocacy in petitions, invited and voluntary *amicus* briefs is not automatically guaranteed success. Instead, my results challenge the popular assumption that the vast majority of the S.G.'s petitions are granted *certiorari* as reward for his "stinginess" in the role as Court "gatekeeper" of federal cases. Some scholars argue that the Solicitor General only appeals cases to the Supreme Court which he thinks he can win in the merit stage. However, my findings demonstrate that nearly half of the petitions for *certiorari* filed by the Solicitor General are denied review. If the S.G.'s strategy in petitioning the Court is the probability of a favorable decision in the merit stage, my results clearly indicate that the S.G. enjoys only modest procedural-level success.

The moderate acceptance rate of the S.G.'s petitions for *certiorari* and his invited and uninvited *amicus* briefs at the petition stage indicate that the S.G. is not the recipient of unfair access to or influence over the Justices.¹⁷⁷ Although enjoying a success rate exponentially higher than most petitioners, the S.G.'s advocacy is still often defeated. Regardless of party affiliation or prior Supreme Court litigation experience, the Solicitor General is successful in about half of his procedural level advocacy.¹⁷⁸

In the 1999-2000 and 2001-2002 Terms selected for analysis, the number of invitations issued to the S.G.'s office remained almost constant.¹⁷⁹ While Meinhold and Shull assume the spike of twenty-three CVSGs issued in 2002 is attributed to the Justice's high-regard for Olson, close inspection of the court invitations to the Solicitor General prove the increase was an anomaly. Though during Olson's tenure the Court has issued an increasing number of CVSGs, it is the result of a gradual trend. As the October 2003-2005 Term comes to a close; Olson has been invited to submit only six *amicus* briefs on petitions for *certiorari*. Finally, my findings indicate that the steady increase of CVSGs represents an increased reliance or respect for the government's lawyer, not a specific S.G.

The modest acceptance rate of the S.G.'s petitions for *certiorari* and the reasonable success of his invited and uninvited *amicus* briefs at the petition-stage indicate that the S.G. is not afforded an unfair level of access or influence in procedural-level decisions. My procedural level results indicate that, regardless of party affiliation or

¹⁷⁷ Waxman filed twenty-five petitions for *certiorari* in 1999, eleven were granted. In 2001, Olson filed twenty-seven petitions for *certiorari* of which 15 were granted.

¹⁷⁸ In the selected terms, 1999 and 2001, Waxman was nearing the end of his tenure and Olson was only beginning his career as Solicitor General.

¹⁷⁹ In 1999, Waxman was issued ten CVSGs, in 2001, Olson was issued only nine.

prior Supreme Court litigation experience, the S.G. is successful in about half of his procedural level advocacy. As he enjoys tremendously higher acceptance rates than other petitioners, the S.G. obviously maintains an exclusive level of influence over the Court. The views of the “Tenth Justice” carry weight over the procedural-level decisions of the Supreme Court, yet this pressure is far from obligatory.

Decision-Making Level Results

Throughout my results from the decision-making level or merit stage of Court litigation, several factors are revealed as consistent between the two S.G.s. First, with the exception of *Bell v. Cone*¹⁸⁰ and *Dickerson v. United States*,¹⁸¹ the votes in all the high-profile cases in both 1999 and the 2001 involving S.G. litigation repeatedly produced 5-4 or 6-3 margins. While a highly-divided Court may derive from the controversial nature of a case, it also indicates a delicate majority, most-likely formed of compromise and vulnerable to external influence. The subject matter between the high-profile cases in the 1999 and 2001 terms is also similar, lending their comparison even more relevancy. The questions presented in the high-profile cases involving Solicitor General litigation included many First Amendment and privacy controversies as well as nationally polarizing issues, such as abortion, school vouchers, and drug testing.

The content analysis of the S.G.’s influence over the Court’s decisions reveals that a superficial examination of his success is an inadequate measurement of influence. If the “success” of the S.G. was compared between the high-profile cases of the 1999 term and the 2001 term, clearly Seth Waxman’s record¹⁸² is far inferior to Ted Olson.¹⁸³

¹⁸⁰ In 2001’s *Bell v. Cone*, the Court issued an 8-1 plurality.

¹⁸¹ In 1999’s *Dickerson v. United States*, the Court issued an 7-2 plurality.

¹⁸² Of the seven high-profile cases during the 1999 Term, Seth Waxman won only three.

However, in all the cases studied in both terms, the advocacy of the Solicitor General is always acknowledged, either explicitly or through parallels in argumentation. Even when the Court rejects the Solicitor General's conclusion, the majority opinion dedicates a portion of the opinion to discussing his counterpoints. This attention to the litigation of the S.G. is evidence of the Court's respect for his arguments, whether they are accepted and become part of common law, or as legitimate opposition to the majority opinion. A similar practice is often applied to Justices who file dissenting opinions. The majority opinion often recognizes dissenting arguments as legitimate counterpoints. The comparable treatment of the S.G.'s advocacy gives merit to his unofficial designation as the "Tenth Justice." Both Waxman and Olson are given similar degrees of recognition in the majority opinion, regardless of if the Court's decision reflects the Solicitor General's advocated conclusions.

In both the 1999 and 2001 terms, the Solicitor General demonstrates his multiple responsibilities to the three branches of the federal government. While the analogy of the S.G. as "gate-keeper" is proven misleading by the procedural-level analysis, his other implicit responsibilities have a dramatic impact on the majority opinion. For example, in *McKune v. Lile*, Solicitor General Olson dedicated the majority of his *amicus* brief to defending the federal sex offender treatment program, even though not at issue or recognized in the questions presented. The S.G. argues that an adverse decision to Kansas's rehabilitation program would have a detrimental effect on the federal government's program. Even though the Court upheld the constitutionality of Kansas's STAP, the majority opinion uses the merits of the federal program in the reasoning

¹⁸³ Olson lost only one of his eight high-profile cases of the 2001 term.

upholding the program's constitutionality. *Mitchell v. Helms* provides an example of the Court's recognition of the legal expertise of the Solicitor General Waxman. The majority opinion lauds the insight of his *amicus* in arguing that a decision overturning Chapter 2 would represent a violation to the Free Exercise Clause, although only the Establishment Clause was at issue.

As *amicus* in the merit-stage, the Solicitor General is often the advocate for the policy priorities of their appointing president as evidenced in *Apprendi v. New Jersey*, *Stenberg v. Cahart*, *Zelman v. Simmons-Harris* and *Bell v. Cone*. As petitioner or respondent, the S.G. is either defending Congressional statutes as in *United States v. Morrison*, *United States v. Playboy*, and *Dickerson v. United States* or acting as the lawyer for departments, agencies or officials of the federal government in cases such as *United States v. Drayton*, *Mitchell v. Helms*, *McKune v. Lile* and *Aschcroft v. Free Speech Coalition*. Finally, the Solicitor General's greatest discretion in submitting voluntary *amicus* briefs submitted at the merits stage of a case, represents the S.G.'s most significant influence over the Court. Although not even an original party in the case, as *amicus*, the Solicitor General has the opportunity to advocate the policies of his appointing President, provide impartial legal reasoning, and serve as advisor to the Court of the implications of its decisions on the executive branch. And as my preceding results have demonstrated, the *amicus* briefs filed by the Solicitor General are undoubtedly influential over the argumentation and decisions of the majority opinions.

Although the Supreme Court does always not accept the procedural or decision-making advocacy of the Solicitor General, the majority of the Court always demonstrates deference to his litigation. More importantly, as the most discretionary advocacy role (as

voluntary *amicus* at the merit-stage of a case) of the Solicitor General also has the greatest potential to influence the Court, the S.G. must be monitored and scrutinized by Court researchers. If an activist-President were to pressure the Solicitor General to submit more *amicus* briefs, the current precarious boundary between the executive and the judiciary would be threatened. Though not an omnipotent source of influence over the procedural or decision-making levels of Supreme Court advocacy, the prestige and respect for the S.G. has the potential to degrade the democratic principal of separation of powers. A future, more comprehensive study would extend my methodology to more Supreme Court terms in comparing the influence of different S.G.s. Although my study of only two terms of Solicitor General advocacy cannot give an exact, quantitative measurement of the S.G.'s influence over the Supreme Court, my results prove that the President must continue to appoint responsible Solicitors General who will respect the mutual relationship between the office and the Supreme Court. However, the public, the media, and academia must observe the escalating involvement and influence between the executive and the judiciary. The Solicitor General is more successful and influential than any external actor in the Supreme Court. To safeguard the democratic foundation of the institution and the balance of power between the executive and judicial branch, mainstream media and academic research must dedicate more resources and attention to monitoring the evolving role of the Solicitor General.

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